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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

CHARLES A. A'HEARN,

Petitioner,

v.

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Charles A. A'Hearn, respectfully prays that a writ of certiorari issue to review the judgment or order of the Court of Appeals of the State of New York, dated January 23, 1969, affirming an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered May 10, 1968, which affirmed, by a divided court, an order of the Supreme Court, New York County, entered January 8, 1968, which denied petitioner's motion for an order quashing, or, alternatively, modifying, a subpoena *duces tecum* issued to petitioner by respondent (A5-A6; A37-A38; AI).

Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 23 N Y 2d 916, —— N. E. 2d ——, —— N.Y.S. 2d ——; and is appended hereto (App. A, pp. 27-28).

The opinions of the majority and dissenting Justices of the Appellate Division, Third Department, are reported in 30 A D 2d 47, 289 N.Y.S. 2d 994, and are appended hereto (App. A, pp. 29-44).

The opinion of the Justice of the Supreme Court of the State of New York, New York County, is reported in 55 Misc 2d 540, 285 N.Y.S. 2d 744, and is appended hereto (App. A, pp. 45-47).

Jurisdiction

The date and date of entry of the judgment or order sought to be reviewed is January 23, 1969 (AI; App. B, pp. 48-49).

No order was made respecting a rehearing or extending the time within which to petition for certiorari.

The jurisdiction of this Court is invoked under Section 1257 of Title 28 of the United States Code.

Questions Presented

The Appellate Division of the Supreme Court, State of New York, First Judicial Department, embracing New York and Bronx counties, recently adopted a Rule, designated as Rule XII-A of its Part 4 Rules. This Rule, which is set out in full in Appendix C hereto, pages 52-53, authorizes the Clerk of the Appellate Division, on application of any of three named bar association unlawful practice

committees, to issue subpoenas, in the name of the Presiding Justice, to any person selected by the Committee as a target of investigation of unlawful practice of law, notwithstanding absence of any charge or complaint against the target subpoenaed, and absence also of any action or proceeding, civil or criminal, in such Court, or in any other court, involving such person as a party or witness.

In the State of New York, unauthorized practice of law is a crime and there is no statute of the state authorizing investigation of such crime, or of any other crime, by the Appellate Division of the Supreme Court or by any bar association. Bar associations in the State of New York are non-integrated, private membership corporations; none is an agency of the state.

Pursuant to Rule XII-A, a subpoena *duces tecum* was issued to petitioner, a non-lawyer in the business of pension and profit sharing planning, commanding him to produce all of his private books, records and papers for a seventeen months' period of time before a one-man subcommittee of respondent. There is no evidence that petitioner has practiced law, or has held himself out to be a lawyer; no such evidence was shown or disclosed by respondent in its application for the subpoena, and respondent has admitted that the "services actually rendered and intended to be rendered by" petitioner "may well be confined to actuarial, administrative, ministerial services, or other activities which may properly be performed by laymen" (A28). No charge or complaint of any kind has been made, or any action or proceeding, civil or criminal, commenced, against petitioner by respondent or anybody else; there is no evidence that anybody, other than petitioner, is under such a subpoena investigation by respondent. No statute of the State of New York or rule of court, other than Rule XII-A, establishes, regulates or supports such an investigation.

The question presented is:

Whether the Rule XII-A subpoena procedure upheld below is repugnant to and and violates the rights, privileges and immunities of petitioner specially set up and claimed under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

If certiorari is granted there would be involved on the appeal the subsidiary questions:

1. Whether the Appellate Division of the Supreme Court, State of New York, has original jurisdiction over unlawful practice of law?

2. Whether Rule XII-A violates the rule making power of the Appellate Division of the Supreme Court, State of New York?

3. Whether the Appellate Division of the Supreme Court, State of New York, has power to investigate the crime of unlawful practice of law?

4. Whether a non-integrated private membership bar association has power, without statutory authorization, to investigate the unlawful practice of law?

5. Whether Rule XII-A violates the subpoena power of the Appellate Division of the Supreme Court, State of New York, which is limited by statute to issuance of a subpoena in "a cause pending in that court"?

Constitutional Provisions, Statutes and Regulations Involved

The constitutional provisions, statutes and regulations involved are set forth in Appendix C hereto.

The constitutional provisions are the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The statutes of the State of New York are Civil Practice Law and Rules, Sections 102, 105(a), 105(b), 105(d), 304, 2302(a); Code of Criminal Procedure, Section 5; Judiciary Law, Sections 2-b, 90, 216, 229, 476-a, 476-c, 478, 485, 750B; and Penal Law, Section 10:00, subd. 6.

The rules are Rules I, XII and XII-A of the Part 4 Rules of the Appellate Division, Supreme Court, State of New York, First Judicial Department, and Rules 691.1 and 691.13 of the Part 691 Rules of the Appellate Division, Supreme Court, Second Judicial Department.

Statement of the Case

In New York, unauthorized practice of law is a crime (Judiciary Law, Secs. 478, 485; Penal Law, Sec. 10:00, subd. 6, App. C, pp. 67-69). Petitioner is not a lawyer (A9). There is no evidence that he has practiced law, assumed to have practiced law, or held himself out as qualified to practice law. For more than 40 years he has been a life insurance agent, and for 25 or more of the years has been engaged in the business of pension and profit sharing planning (A9).

In November, 1966, a one-man subcommittee of respondent Committee sent a form letter to petitioner stating that it "appears to the Committee" that petitioner's business of pension and profit sharing planning, "may constitute the unauthorized practice of law" (A23-A24). The subcommittee requested petitioner to meet with him and bring a "sampling" of substantially all of petitioner's records (A23-A24). Petitioner replied and inquired whether respondent was conducting an investigation of petitioner or an in-depth study of the business of pension and profit

sharing planning (A25-A26). Respondent replied, stating, in part, as follows (A28):

> "The Committee recognizes, of course, that the services actually rendered and intended to be rendered by you may not fall within the areas proscribed * * *, and may well be confined to actuarial, administrative, ministerial services, or other activities which may properly be performed by laymen.
>
> Our communication to you was designed to elicit the actual and pertinent facts.
>
> Your cooperation is being sought at this point on an entirely voluntary basis. The determination, however, of whether you desire to cooperate with the Committee will necessarily have to be made by you independent of any statement, representation or precondition on the part of the Committee concerning its aims, purposes and objectives."

Petitioner, in reply, stated he had "no desire to cooperate with a Committee unwilling to state its aims, purposes and objectives" (A29).

There followed adoption of Rule XII-A by the Appellate Division, First Judicial Department, and the issuance by its Clerk of the subpoena *duces tecum* to petitioner (A13-A14). The subpoena commands appellant, under penalties of contempt of court and damages, to produce virtually all of his private books and papers, without limit as to time[1], before a one-man subcommittee of respondent sitting in one of the bar assoication committee rooms (A13-A14).

---

[1] On the motion to quash, respondent modified the command of the subpoena to a seventeen months' period of time between January 1, 1966 and May 31, 1967 (A21). This is as arbitrary and oppressive as the original demand. Since no charge or complaint has been made against petitioner there is no time period relevant to any issue.

Respondent's application for the subpoena *duces tecum* was made by letter from its Chairman to the Clerk of the Appellate Division, reading as follows (A30-A31):

> "Pursuant to Rule XIIA of Part 4 of the Rules of the Appellate Division, First Department, application is hereby made for the issuance of a subpoena directing Charles A. A'Hearn to appear before this committee.
>
> This application is made by reason of the fact that the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association has cause to believe that the above named party is unlawfully practicing or assuming to practice law and said Committee desires to conduct an investigation thereof."

Thereupon, the subpoena *duces tecum* was issued, and thereafter served upon petitioner (A9, A13-A14).

No order, directive, rule or resolution has ever been made or adopted by the Appellate Division, First Department, or by any other court, authorizing or providing for investigation of petitioner, or of the unlawful practice of law, by the court, by respondent, or by anybody else. There is no statute of the State of New York authorizing or providing for any such investigation by any court or bar association. Nor is any such investigation being conducted by the District Attorney, the State Attorney General or other statutory officer, agency or body.[2]

Petitioner's motion, duly and timely made, to quash or modify the subpoena was denied by order of the Supreme Court, New York County (A5-A6), which was affirmed, one Justice dissenting, by order of the Appellate Division,

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[2] The only New York State official authorized by statute to investigate unlawful practice of law is the Attorney General and his authority is limited to investigation of complaints (Judiciary Law, Sec. 476-c, App. C, pp. 66-67).

Third Judicial Department (A37-A40), which was affirmed by the order or judgment of the Court of Appeals sought to be reviewed (AI).[3]

Justice Herlihy of the Appellate Division, Third Department, stated in dissent (A54-A56):

> "* * * the application (for the subpoena) failed to disclose that the applicant (respondent) had any reason to believe the petitioner was practicing or assuming to practice law. * * * The application for the subpoena discloses nothing beyond a desire to investigate nor did the respondent's affidavit on the motion (to quash). * * * the application for the subpoena was not verified, did not set forth facts, nor did it set out the source of respondent's belief that the appellant was unlawfully practicing law. In short, there was no proof that the appellant was doing anything wrong. The affidavit in opposition to the motion to quash, * * * gave no facts, set forth no source of information or in any respect gave a basis for the relief requested by respondent.
>
> * * *
>
> * * * the present record contains nothing to create even a suspicion that the petitioner has been engaged in dispensing legal advice. * * * The recital of mere suspicion followed by a declaration of purpose to investigate the correctness of such suspicion indicates a voyage of discovery that the law does not tolerate."

The Court of Appeals, in its decision sought to be reviewed, upheld the subpoena, but stated (App. A, pp. 27-28):

> "It is ancient law that no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the

---

[3] Petitioner's appeal from the order of the Supreme Court, New York County, was taken, as required, to the Appellate Division, First Department, which, on its own motion, transferred the appeal to the Third Department (A39-A40).

prospect of possible violations of law being discovered, especially with respect to subpoena duces tecum * * *. Such strictures are even of greater applicability when a nongovernmental organization, such as that involved here, has delegated to it powers of inquiry."

* * *

It would have been better, * * * that the committee should have shown in response to the motion to quash that there was reasonable ground to believe that there was illegal practice of law in this area of pension and profit-sharing planning, even if not directly attributable to any particular person called as a witness, and still better if such a showing, however slender, had been made with respect to this witness (petitioner). * * *

Significantly, the rule of the Appellate Division for the First Department required as a condition precedent that the committee disclose, not merely assert, that it had reason to believe that the person to whom the subpoena is addressed is unlawfully practicing or assuming to practice law."

Stages and Manner in Which Federal Questions Sought to Be Reviewed Were Raised

Petitioner, in moving to quash, alleged in his supporting affidavit that the subpoena was issued without any factual showing of cause and without due process in violation of the Constitution of the United States (A11). On brief, petitioner contended that Rule XII-A may violate the Fourth and Fourteenth Amendments.

On appeal to the Appellate Division, Third Department, petitioner contended on brief that the subpoena procedure authorized by Rule XII-A violates the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

On appeal to the Court of Appeals, petitioner contended on brief that the procedure violates the Fourth, Fifth,

Sixth and Fourteenth Amendments to the Constitution of the United States.

Both the majority and dissenting justices of the Appellate Division, Third Department, discussed Federal constitutional issues raised by petitioner (A49-A53; A54; A55-A58). The majority opinion states (A49):

> "* * * He (petitioner) contends that rule XII-A, unless construed to apply only to pending actions or proceedings, contravenes his rights and immunities under the Federal and State Constitutions. He stresses, in particular, the supposed violation of the prohibition against unreasonable searches and seizures imposed by the Fourth Amendment to the Constitution of the United States. * * * He seems not to press his additional contentions of deprivation of other constitutional rights; * * * but we have considered them nevertheless, * * *."

The dissenting Justice of the Appellate Division, Third Department, stated (A54, A58):

> "* * * petitioner in his contentions as to the violation of his constitutional rights raises the more fundamental issue as to whether or not this was a proper case for the exercise of the subpoena power. Whatever presumption of regularity might be otherwise indulged in is inapplicable in the present proceeding.
>
> * * *
>
> Under the circumstances of this case, there being a failure to show any cause, 'probable or otherwise', for the attendance of the petitioner or for the production of his records, the motion to quash should have been granted, * * *."

Both the majority and dissenting opinions refer to and discuss this Court's decisions in *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186 (1946); *United States* v. *Morton*

Salt Co., 338 U. S. 632 (1950); and *United States* v. *Powell*, 379 U. S. 48 (1964), involving the Fourth and Fifth Amendments (A50-A53; A56-A58).[4]

The Court of Appeals concurred in the majority opinion of the Appellate Division on the constitutional issues, stating (App. A, p. 27):

> "The issues in this case are discussed in detail with elaborated reasoning in the opinions of the Appellate Division. It might have sufficed to rest on the majority opinion in that court * * *."

The Court of Appeals, by order dated April 9, 1968, granted a post-decision motion of petitioner to recall and amend its remittitur to state (App. B., p. 49a):

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Petitioner-appellant contended that Rule XII-A of the Part 4 Rules of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the subpoena *duces tecum* issued to petitioner-appellant pursuant to such Rule, violate his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals considered these questions and held that there was no denial of any constitutional right of petitioner-appellant."

---

[4] Cases, like these, involving investigations by Congress for legislative purposes by Federal agencies created by Congress, or, like the *Powell* case, involving the required records doctrine, do not support investigation of a crime by a court or by a private membership bar association without statutory authorization. This Court said in the *Morton Salt Co.* case, 338 U. S. 641: "Federal judicial power itself extends only to adjudication of cases and controversies * * *. The judicial subpoena power * * * is subject to specific constitutional limits, * * * such as those against self-incrimination, unreasonable search and seizure and due process of law."

Reasons for Allowance of Writ

I

The New York Court of Appeals has decided a grave question of constitutional law in a way that is repugnant to the Fourth, Fifth, Sixth and Fourteenth Amendments, and in conflict with this Court's decision in *Boyd* v. *United States,* 116 U. S. 616 (1886), and its long line of distinguished progeny.

Petitioner, without being charged with a crime or offense, and on a record devoid of "proof that" he "was doing anything wrong" (A54), a record containing "nothing to create even a suspicion of" wrongdoing (A55), has been subjected by a rule of court to a subpoena *duces tecum* criminal investigation procedure that might well destroy petitioner's business and reputation (Cf. *Wood* v. *Hughes,* 9 N Y 2d 144 (1961), 173 N. E. 2d 21). The "duty", recognized by this Court in *Boyd,* "to be watchful for the constitutional rights of the citizen" (116 U. S. 635), has compelling significance here where the constitutionally questionable procedure emanates, not from a busy "legislative body" (116 U. S. 635), but from the second highest court of the State of New York, and is being executed for an undisclosed purpose (A55-A56) by a private membership bar association "with no vestment of public authority and no power of law enforcement" (*Matter of Bar Association, Erie County,* 182 Misc. 529, 535 (County Ct., 1944), 47 N.Y.S. 2d 213, 218).

This subpoena *duces tecum* procedure, whereby "the innocent would be confounded with the guilty" (116 U. S. 629), authorizes, notwithstanding absence of a charge or complaint, and absence also of any action or proceeding, the compulsory production, without probable cause, of a man's private books and papers for the purpose of establishing out of his own mouth and by his own books and papers that he is guilty of a crime.

This is constitutionally prohibited by both the Fourth and Fifth Amendments, as this Court held in *Boyd,* saying, 116 U. S. 631-632:

> "* * * any compulsory discovery by exhorting the party's oath, or compelling the production of his private books and papers, to convict him of a crime, or to forfeit his property is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. * * * it cannot abide the pure atmosphere of political liberty and personal freedom."

Respondent Committee, as the dissenting Justice of the Appellate Division observed, has proceeded upon the presumption that petitioner's business of pension and profit sharing planning involves legal advice and legal services, and, therefore, petitioner may be guilty of the crime of unlawful practice of law (A55). Since the decision below, the New York Appellate Division, Second Judicial Department, embracing nine metropolitan area counties, has adopted a rule, No. 691.13, effective April 1, 1969, similar to the First Department's Rule XII-A (App. C, pp. 53-54). It is fair to assume that the other two Judicial Departments of the Appellate Division of the State Supreme Court may follow suit and that this Rule XII-A procedure will reach throughout the state and, by the medium, among others, of the Unauthorized Practice News, throughout the country.

Thus, under the decision below, every bank and insurance company with a pension and profit sharing plan department, every bank with a trust department, every life insurance agent, estate planner, real estate broker, title company, accountant, and, to use the words of the Second Department's similar rule, every "person, firm, corporation or other organization" "engaged in any business or activity which may involve the unlawful practice of law" (App. C, p. 53), is subject to similar subpoena *duces tecum* investigation, without charges or probable cause, and without action or proceeding pending.

This subpoena procedure violates: (a) the Fourth Amendment right of the people to be secure in their persons and effects; (b) the Fourth Amendment requirement of probable cause; (c) the Fifth Amendment prohibition against compulsory self-incrimination; (d) the Fifth Amendment guarantee of due process; (e) the Sixth Amendment right to be informed of the nature and cause of the accusation; and (f) the Fourteenth Amendment guarantees against state invasion of the Bill of Rights Amendments and of equal protection of state laws.

II

The Fourth Amendment

The Courts below have held that neither decisional law nor public policy imposes the Fourth Amendment prohibitions upon an inquiry into crime conducted or sanctioned by a court. The majority of the Appellate Division, stated (A49):

> "We find nothing in the constantly expanding body of the pertinent decisional law constraining us to impose upon a judicial inquiry * * * the rigid test or good cause standard for which appellant contends; nor do we perceive any element of public policy pointing to the necessity for such a requirement in this or future cases."

Compulsory production of a person's private books and papers to establish his guilt of a crime while disavowing, as has respondent, any knowledge of his wrongdoing, and admitting, as has respondent, that his conduct may well be law abiding, surely violates, to an extreme degree, the Fourth Amendment right of the people to be secure in their persons and effects against unreasonable searches and seizures. Surely, such a procedure is unreasonable, and violates also the Fourth Amendment requirement of probable cause. Justice Herlihy of the Appellate Division, dissenting below, found that there was "a failure to show any cause, 'probable or otherwise', for the attendance of the petitioner or for the production of his records" (A58).

The New York Court of Appeals did not disagree with this finding. The Court of Appeals stated (App. p. 28):

> "It would have been better, but it is not essential, that the committee should have shown in response to the motion to quash that there was reasonable ground to believe that there was illegal practice of law in this area of pension and profit-sharing planning, even if not directly attributable to any particular person called as a witness, and still better if such a showing, however slender, had been made with respect to this witness (petitioner)."

A "failure to show any cause" necessarily results from the omission to make such a "better" and "still better" showing. The Court of Appeals thus held, in effect, that a showing of probable cause was "not essential" for issuance of the subpoena *duces tecum* or denial of the motion to quash.

The Court of Appeals went on to hold that Rule XII-A itself requires a showing of probable cause for issuance of a subpoena, and then concluded to uphold the subpoena here notwithstanding its issuance without even a "slender" showing of cause. The Court of Appeals stated (App. A, p. 28):

> "Significantly, the rule of the Appellate Division for the First Department required as a condition precedent that the committee disclose, not merely assert, that it had reason to believe that the person to whom the subpoena is addressed is unlawfully practicing or assuming to practice law.
>
> Accordingly, the order of the Appellate Division should be affirmed."

The determination of the Court of Appeals to affirm denial of petitioner's motion to quash is plainly incongruent with respondent's failure to comply with the significant Rule XII-A "condition precedent that the committee disclose, not merely assert, that it had reason to believe that the person to whom the subpoena is ad-

dressed is unlawfully practicing or assuming to practice law" (App. A, p. 28).

The fishing expedition nature of the investigation is thus emphasized by the manifest disregard by the Court of Appeals of its own view of the significant Rule XII-A "condition precedent" disclosure requirement. A subpoena *duces tecum* may not be justified by what it may discover and the discovery, if made, by the subpoena, any more than an arrest may be justified by a search and the search by the arrest. (*Johnson* v. *United States,* 333 U. S. 10, 16 (1948); *United States* v. *Di Re,* 332 U. S. 581, 595 (1947)).

The decision below, in respect of the Fourth Amendment, is also probably in conflict with this Court's decisions in *Berger* v. *United States,* 388 U. S. 41 (1967); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *Warden* v. *Hayden,* 387 U. S. 294 (1967); *United States* v. *Ventresca,* 380 U. S. 102 (1965).

III

The Fifth Amendment

(A) *The Privilege Against Self-Incrimination*

It is "clear" from *Boyd,* as this Court recently held in *Schmerber* v. *California,* 384 U. S. 757, 763-764 (1966):

> "* * * that the protection of the privilege reaches an accused's communications, whatever form they might take and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. *Boyd* v. *United States,* 116 U. S. 616."

See also: Justice Black's dissent, 384 U. S. 775.

Authoritative confirmation for the proposition that the subpoena procedure upheld below violates the Fifth Amendment privilege against self-incrimination and this Court's decision in the *Boyd* case will be found in Judge Friendly's recent Robert S. Marx Lectures at the College

of Law, University of Cincinnati, entitled "5th Amendment Tomorrow, The Case for Constitutional Change" (37 University of Cincinnati Law Review, No. 4, p. 671).

Judge Friendly had this to say about the Fifth Amendment privilege and this Court's decisions in the *Boyd* and *Schmerber* cases (37 University of Cincinnati Law Review, No. 4, p. 701):

> "* * * lovers of the privilege should brace themselves for a shock. I favor an amendment that would abolish the privilege with respect to chattels, notably including documents, in the possession of the defendant which are sought to be obtained by reasonable subpoena or other legal process.
>
> * * * the seeming enormity of this proposal to amend the Constitution so as to overrule the Fifth Amendment holding in *Boyd,* can be gauged by Mr. Justice Black's recent characterization of that case as 'among the greatest constitutional decisions of this Court' " (*Schmerber* v. *California,* 384 U. S. 757, 776 (1966), dissenting opinion).

Judge Friendly then proposed the following amendment to the Constitution of the United States (37 University of Cincinnati Law Review, No. 4, p. 721):

> "The clause of the fifth amendment to the Constitution of the United States, 'nor shall be compelled in any criminal case to be a witness against himself,' shall not be construed to prohibit:
>
> (1) Interrogating any person or requesting him to furnish goods or chattels, including books, papers and other writings, without warning that he is not obliged to comply, unless such person has been taken into custody because of, or has been charged with a crime to which the interrogation or request relates."

Petitioner has not been taken into custody or charged with the crime of unlawful practice of law. Thus, an in-

quisitional procedure which, in Judge Friendly's opinion, would be constitutionally impermissible without overruling this Court's decision in *Boyd* by amendment of the Fifth Amendment, has been upheld below.

Judge Friendly, to be sure, does not go so far as to suggest that the Fifth Amendment should be amended to permit the questioning under oath of a person suspect of a crime by a judicial investigation procedure ordered, conducted or sanctioned by an appellate court that would have jurisdiction of an appeal from a judgment of conviction of the crime, a criminal contempt judgment, or one granting an injunction restraining the criminal conduct.[5] This is what the courts below have held to be constitutionally permissible.

(B) *The Due Process Clause*

The subpoena procedure upheld below also violates the Fifth Amendment guarantee of due process.

No charge or complaint has been made against petitioner. No action or proceeding has been instituted against

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[5] The majority opinion of the Appellate Division, Third Department, states: "From our conclusion that the Appellate Division had the right to order, conduct or sanction the investigation undertaken by respondent, the court's power of subpoena follows as a matter of course" (A48).

In New York, the remedies available to enforce the prohibition against unlawful practice of law are more than adequate. They are: (1) criminal prosecution for violating Section 478 of the Judiciary Law which is made a misdemeanor by Section 485 of the Judiciary Law, which is a crime by Section 10:00, subd. 6, of the Penal Law (App. C, pp. 67-69); (2) an action for an injunction pursuant to Section 476-a of the Judiciary Law (App. C, p. 65); (3) a criminal contempt proceeding pursuant to Section 750B of the Judiciary Law (App. C, p. 68); and (4) a summary injunction proceeding where the facts are not in dispute (*Matter of New York County Lawyers Ass'n* (Bercu), 273 App. Div. 524 (1st Dept., 1948), aff'd, 299 N. Y. 728, 87 N. E. 2d 451).

him in any court.[6] He has not been served with a summons, warrant, complaint, notice of petition, petition or order to show cause. There is no statute empowering the Appellate Division, First Department, or any other court, to investigate, or to authorize a bar association to investigate, the unlawful practice of law or any other crime. Nor is there any statute or rule regulating the investigation practice or procedure or providing for report or other action upon the evidence adduced on the investigation.

A judicial subpoena "is not an independent process, but is always connected with an action or special proceeding," *Goldberg* v. *Candy Products, Inc.*, 127 Misc. 455 (Mun. Ct., 1926), 215 N.Y.S. 772, 774; *Matter of Art Metal Construction Co., Inc.* v. *McGoldrick*, 260 App. Div. 153, 154 (1st Dept., 1940), 21 N.Y.S. 2d 437, 439. Section 2-b, subd. 1, of the Judiciary Law of the State of New York, indeed, expressly limits the subpoena power of a court of record to issuance of a subpoena "in a cause pending in that court" (App. C, p. 56).

Petitioner is being investigated upon a subpoena alone and absent a "cause pending," either by a court having no power of investigation, or by a self-appointed bar association acting without benefit of statute, court order or directive. He is being investigated by a procedure that

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[6] In New York remedies for the enforcement of rights are "divided into two classes, viz: actions and special proceedings" (*People* v. *American Loan & Trust Co.*, 150 N. Y. 117, 123 (1896), 44 N. E. 949, 951). The word "action", as defined by CPLR 105(b), includes a "special proceeding" (App. C, p. 55). A "civil judicial proceeding," as defined by CPLR 105(d), "is a prosecution, other than a criminal action, of an independent application to a court for relief" (App. C, p. 55). A "criminal action," as defined by CCP, Sec. 5, is a "proceeding (by) which a party charged with an offense is accused and brought to trial and punishment" (App. C, p. 56). In matters civil, as provided by CPLR 304, "An action is commenced and jurisdiction acquired by service of a summons. A special proceeding is commenced and jurisdiction acquired by service of a notice of petition or order to show cause" (App. C, p. 55).

" 'would never pass muster in any normal civil or criminal litigation' " (*In re Ruffalo*, 390 U. S. 544, 551 (1968)); a procedure whereby a court conducted or sanctioned investigation of a crime operates with a one-man subcommittee of respondent acting as preliminary judge or referee, and the attorney for respondent as prosecutor in the privacy of a bar association committee room.[7]

As this Court stated in *Jones* v. *Securities Commission*, 298 U. S. 1, 27 (1936):

> "A general roving offensive, inquisitional, compulsory investigation, conducted by a commission without any allegations, upon no fixed principles and governed by no rules of law, or of evidence, and no restrictions except its own will, or caprice, is unknown to our constitution and laws; and such an investigation would be destructive of the rights of the citizen, and an intolerable tyranny."

An investigation of crime by a court acting as an investigator before charges and before acquiring jurisdiction in an action or proceeding would necessarily be devoid of due process. As Justice Crownhart said in *Rubin* v. *State*, 194 Wis. 207, 223, 216 N. W. 513, 520 (1927), dissenting opinion:

> "Inquisitions by courts are foreign to the common-law courts, except through the government agency of a grand jury. This was the situation when the Constitution was adopted, and since. If the necessity existed for inquisitorial power in the courts, it seems to me it would have been exercised at some time during these centuries. It cannot now be presumed; on the contrary it can be presumed that the grand jury, the district attorney, individual contempt, disbarment pro-

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[7] In New York, a state legislative committee is prohibited from taking testimony at a private hearing, or at a public hearing unless at least two members are present (Legislative Law, Sec. 60, McKinney's Con. Laws of N. Y. Annotated, Book 31, Sec. 60).

ceedings and the criminal law are sufficiently potent to fully and adequately prevent these evils."

This reasoning, in respect of a disciplinary proceeding investigation, involving conduct that is unprofessional, applies with greater force to a court investigation of conduct that is criminal. In New York too, as held in *Ward Baking Co.* v. *Western Union Telegraph Co.*, 205 App. Div. 723, 727-728 (3rd Dept., 1923), 200 N.Y.S. 865, 869:

> "* * * The proceedings before a grand jury constitute the only general criminal investigation known to the law. * * * 'No such power of inquisition is given to a magistrate. To the grand jury, and to it alone, is given the power of investigation without a definate charge.'"

The Appellate Division, Third Department, below, recognizing this grand jury principle, found it necessary, to sustain the subpoena here, to, in effect, grant to the Appellate Division the powers of a grand jury; indeed, also the powers of the State Attorney General. The majority stated (A50):

> "* * * it would be unreasonable indeed to deny to the court inquisitorial powers at least equal to those possessed by a Grand Jury and by the Attorney General."

To grant such powers to a court would be as unreasonable as it would be constitutionally impermissible. The court would then have three constitutional office trusts, each of which would be incompatible with the other two.[8] The

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[8] The grand jury in New York derives its powers from the Constitution, Art. I, Sec. 6, and statutes, including 40 sections of the Code of Criminal Procedure (McKinney's Con. Laws of N. Y. Annotated, Book 2, Part I, Art. I, Sec. 6; Book 66, Part I, Secs. 223-260).

The Attorney General is a constitutional officer whose duties are executive and administrative, not judicial (Constitution, State of New York, Art. V, Secs. 1, 2, 4, McKinney's Con. Laws of N. Y. Annotated, Book 2, Part 2, Art. 5, Secs. 1, 2, 4; Executive Law, Sections 60, 63, McKinney's Con. Laws of N. Y. Annotated, Book 18, Secs. 60, 63).

function of a court is to determine causes between litigants, not to create causes (*Marbury* v. *Madison,* 1 Cranch 49, 68 (1803); *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226 (1908)). Courts, as the New York Court of Appeals itself has held, are "not adjuncts or instrumentalities, of other agencies of government" (*Matter of Richardson,* 247 N. Y. 401, 411-412 (1928), 160 N. E. 655, 658; *Knapp* v. *Fasbender,* 1 N Y 2d 212, 249 (1956), 134 N. E. 2d 482, 503; 20 Am. Jur. 2d Courts, Sec. 95, p. 455). An investigation is not a "judicial action, suit or special proceeding" (*Matter of Klein* (Lerner), 309 N. Y. 474, 486 (1956), 131 N. E. 2d 888, 895). An investigation by a legislative committee must have a legislative purpose. An investigation by a court would necessarily require a judicial purpose. An investigation of petitioner, or of the unauthorized practice of law generally, would not serve any judicial purpose of the Appellate Division. The information disclosed by such an investigation might suggest a need for legislative action, but not for any judicial action. The Appellate Division has no disciplinary power over the unlawful practitioner of law. The "essence of the judicial function may not be destroyed by turning the power to decide into an opportunity to consult and recommend" (*Matter of Jacobs* v. *Steinbrink,* 242 App. Div. 197, 203 (2nd Dept., 1934), 273 N.Y.S. 498, 506).

The decision below, which has upheld this kind of investigation, is also probably in conflict with this Court's decisions in *Watts* v. *Indiana,* 338 U. S. 49 (1949); *Watkins* v. *United States,* 354 U. S. 178 (1957); *Willner* v. *Committee on Character,* 373 U. S. 96 (1963); *Duncan* v. *Louisiana,* 391 U. S. 145 (1968); *Bloom* v. *Illinois,* 391 U. S. 194 (1968), and *In re Ruffalo, supra,* 390 U. S. 544.

As this Court said in *In re Ruffalo,* 390 U. S. 551, in respect of disciplinary proceedings:

> "These are adversary proceedings of a quasi-criminal nature. * * * The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused."

Here the proceedings are criminal in nature and no charge of any kind has been made known to petitioner. Here, as in *Ruffalo,* the "absence of fair notice as to the reach of the * * * procedure and the precise nature of the charges deprived petitioner of procedural due process" (390 U. S. 552). Couple these procedural due process failures with a court conducted or sanctioned, private membership bar association investigation procedure, constituted upon a subpoena process alone without benefit of a cause pending, a disinterested presiding referee or judge, a distinterested prosecutor, a supporting statute, and governing rules and regulations and the denial of due process is monstrous.

IV

The Sixth Amendment

In the *Boyd* case this Court pointed out that "the Fourth and Fifth Amendments run almost into each other" (116 U. S. 630). This is true here. The Fourth Amendment requirements of reasonableness and probable cause run unto the Fifth Amendment privilege against self-incrimination and guarantee of due process. Additionally, the denial of the Fifth Amendment guarantee of due process, evident from respondent's failure to make known the charge before commencement of the proceedings, runs into the Sixth Amendment guarantee that the accused "shall enjoy the right * * * to be informed of the nature and cause of the accusation."

"It is just as important that one should be fairly accused as that he should be fairly tried" (*Matter of Funston,* 133 Misc. 620, 623 (Sup. Ct. N. Y. 1929), 233 N.Y.S. 81, 85).

Petitioner, in his letter to respondent, in reply to respondent's first communication to him, inquired as to the nature and cause of any accusation against him (A25). Respondent's remarkable answer was that it would not make "any statement, representation or precondition * * * concerning its aims, purposes and objectives" (A28). Re-

spondent has maintained this position of secrecy throughout the proceedings in the courts below. As the dissenting Appellate Division Justice stated (A55-A56):

> "* * * Upon appellant's request for advice as to whether the investigation was directed against him personally or was an in-depth study of such plan, the Committee refused to state its objective. * * * appellant was entitled to know whether he was to become a target of an investigation, the result of which, if found guilty, would subject him to a misdemeanor charge."

"Secrecy" as this Court said in *Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123, 171 (1951), "is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness."

The decision below, in respect to the Sixth Amendment, is, therefore, probably in conflict with this Court's decisions in *Greene* v. *McElroy*, 360 U. S. 474 (1959); *Morgan* v. *United States*, 304 U. S. 1 (1938); *Ohio Bell Tel. Co.* v. *United States*, 301 U. S. 292 (1938).

V

The Fourteenth Amendment

The "Bill of Rights Amendments that are implicit in the concept of ordered liberty are 'absorbed' by the Fourteenth as protections against state invasion" (*Duncan* v. *Louisiana, supra*, 391 U. S. 145, 163-164 (1968)).

The Fourteenth Amendment, Sec. 1, further decrees that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This constitutional guarantee also has been denied to petitioner.

Rule XII-A of the Part 4 Rules of the Appellate Division, First Department, was modeled after Rule XII, Part 4, pertaining to issuance of subpoenas in lawyer disciplinary proceedings on application of bar association grievance committee (App. C, pp. 51-52). In the modeling,

and in equating conduct that is criminal with conduct that is unprofessional, the Court, in effect, cancelled Rule XII-A, pertaining to nonlawyers, by misplacing it among its Part 4 Rules headed "Attorneys," and which by Rule 1, Part 4, are limited in their application to lawyers having offices or conducting actions or proceedings in the First Department (App. C, pp. 51-52). The Court also overlooked the fact that nonlawyers, unlike lawyers, are not subject to disciplinary action by the Appellate Division. And, more importantly, the Court overlooked the need for a supporting statute. Rule XII stands upon the foundation of Section 90 of the Judiciary Law of the State of New York (App. C, pp. 56-62); whereas Rule XII-A has no foundation.

Section 90, governing disciplinary proceedings, provides subdivisions 6, 7, 8, 9 and 10, for furnishing the accused lawyer with a copy of the charges against him, for an opportunity to be heard in his defense, for relief against his default in appearance, for payment of the expenses of the investigation, for prosecution of the charges by a district attorney or a lawyer appointed by the Appellate Division, for a right of appeal, against objection to a judge or referee on the ground that he is a member of a bar association, and for the sealing of the record before judgment sustaining the charges (App. C, pp. 61-62).

The courts below, contrary to petitioner's contention, have construed Section 90 to vest the Appellate Division with original jurisdiction over unlawful practice of law (A47).[9] In reaching this conclusion, the courts below overlooked the fact that the fair procedure provisions of

[9] The Courts below construed the words "supreme court," as they appear in Section 90, subd. 2, to mean appellate division of the supreme court, which also appear in Section 90, subd. 2, but specifically in relation to disciplinary proceedings (App. C, p. 58). The New York Court of Appeals has held that "while there it but one Supreme Court in theory and in fact, it is divided into separate parts, which exercise distinct and dissimilar functions" (*Waldo* v. *Schmidt*, 200 N. Y. 199, 202-203 (1910), 93 N. E. 477,

(*Footnote continued on following page*)

Section 90 apply only to investigation of lawyers and that there are no similar due process provisions in Section 90, or elsewhere, for the protection of nonlawyers under investigation. The result is that petitioner has been held to come within the jurisdiction of the Appellate Division under Section 90, while being denied equal protection of the section provisions designed to protect lawyers against unconstitutional and officious investigation.

In *Matter of Stern,* 137 App. Div. (N. Y.) 909 (1st Dept., 1910), the Court, which later was to adopt Rule XII-A, held that it had a duty to protect its officer members of the bar against investigation of "frivolous or malicious charges." Petitioner, a nonlawyer, is being investigated pursuant to a rule of the same Appellate Division, not for conduct that is unprofessional, but for conduct that is criminal, not upon frivolous or malicious charges, but without a charge having been made against him by anybody. The double standard principle of *Cohen* v. *Hurley,* 366 U. S. 117 (1961), which was rejected by *Spevack* v. *Klein,* 385 U. S. 511 (1967), appears to have been reinstated and applied in reverse so as to deny to nonlawyers constitutional protections granted to lawyers.

Conclusion

WHEREFORE, it is respectfully prayed that this petition for certiorari be granted.

Respectfully submitted,

GEORGE C. WILDERMUTH,
CHARLES M. MCCARTY,
Counsel for Petitioner.

April, 1969.

(*footnote continued from previous page*)

478. "The Appellate Division is a court of review except where original jurisdiction is conferred upon it by the Constitution or statutes of the State" (*Skinner* v. *Paramount Pictures,* 294 N. Y. 474, 478 (1945), 63 N. E. 2d 64, 67). See also, *Matter of Erlanger,* 20 N Y 2d 778, 779, 230 N. E. 2d 727, 728).

APPENDIX A

Opinion of New York Court of Appeals.

In the Matter of CHARLES A. A'HEARN, Appellant, v. COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION, Respondent.

Decided January 23, 1969.

Per Curiam. The issues in this case are discussed in detail with elaborated reasoning in the opinions of the Appellate Division. It might have sufficed to rest on the majority opinion in that court, but, by way of caution, however, some additional comments are desirable.

It is ancient law that no agency of government may conduct an unlimited and general inquisition into the affairs of persons within its jurisdiction solely on the prospect of possible violations of law being discovered, especially with respect to subpoenas duces tecum (see, generally, 2 Weinstein-Korn-Miller, N. Y. Civ. Prac., pars. 2304.02, 2304.07). There must be authority, relevancy, and some basis for inquisitorial action (cf. *Matter of La Belle Creole Int.* v. *Attorney-General,* 10 N Y 2d 192, 196, and cases cited). Thus, it has been held that even under broad investigation statutes the Attorney-General does not have an "arbitrary and unbridled discretion as to the scope of his investigation" (*Carlisle* v. *Bennett,* 268 N. Y. 212, 217, cited and quoted with approval in the *La Belle Creole* case, *supra*). Such strictures are even of greater applicability when a nongovernmental organization, such as that involved here, has delegated to it powers of inquiry.

Moreover, in all inquiries it is always available to the subject of the inquiry to assert and establish that he is being unnecessarily harassed (cf. *Matter of Edge Ho Holding Corp.,* 256 N. Y. 374, 382; cf. *Matter of Dawn Operators* v. *Lyon,* 283 App. Div. 358, 360-361, mot. for lv. to app. den. 306 N. Y. 977, app. dsmd. 307 N. Y. 673; see, generally, 97 C. J. S., Witnesses, § 19, subd. b; § 25, subd. j).

True, in this case there has been but a bare showing for the basis of the inquiry, but it is enough to initiate it. If the inquiry is unduly protracted, unduly intrusive into the affairs of the witness without some showing of utility in its further prosecution, or by the breadth or intensity of the inquiry into the books and papers of the witness it has become unduly burdensome, the witness will not be without remedy, to renew his motion or make other appropriate application. Nor will any similarly situated witness be without remedy.

It would have been better, but it is not essential, that the committee should have shown in response to the motion to quash that there was reasonable ground to believe that there was illegal practice of law in this area of pension and profit-sharing planning, even if not directly attributable to any particular person called as a witness, and still better if such a showing, however slender, had been made with respect to this witness. Certainly some such showing would be necessary after the committee has passed beyond what it has characterized as its preliminary investigation to ascertain what further action by it is necessary. It may not rest alone on its inference that pension planning and profit-sharing schemes involve the drafting of legal instruments unless it can also show that such drafting is being done by unqualified persons.

Significantly, the rule of the Appellate Division for the First Department required as a condition precedent that the committee disclose, not merely assert, that it had reason to believe that the person to whom the subpoena is addressed is unlawfully practicing or assuming to practice law.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

Chief Judge FULD and Judges SCILEPPI, BERGAN, KEATING, BREITEL and JASEN concur; Judge BURKE taking no part.

Order affirmed.

Appendix A

Opinions, Appellate Division, Third Department.

Majority Opinion.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

IN THE MATTER

of

CHARLES A. A'HEARN,

Appellant,

against

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION,

Respondent.

Argued March 7, 1968

Before: HON. JAMES GIBSON, Presiding Justice,
HON. J. CLARENCE HERLIHY,
HON. WALTER B. REYNOLDS,
HON. ELLIS J. STALEY, JR.,
HON. DOMENICK L. GABRIELLI,
Associate Justices.

APPEAL from an order of the Supreme Court at Special Term (Samuel A. Spiegel, J.; opinion 55 Misc 2d 540), entered January 8, 1968 in New York County, which denied a motion by petitioner for an order quashing or, in the alternative, modifying a subpoena duces tecum issued to petitioner by respondent. The appeal was transferred from the Appellate Division of the Supreme Court in the

First Judicial Department to the Appellate Division of the Supreme Court in the Third Judicial Department pursuant to CPLR 5711.

VOLLMER, WILDERMUTH & MCCARTY (CHARLES M. MCCARTY of counsel), Attorneys for appellant, 188 Montague Street, Brooklyn, New York 11201.

DANIEL M. SHIENTAG, Attorney for respondent, 160 Broadway, New York, New York 10038.

Opinion For Affirmance.

GIBSON, P. J.:

The petitioner appeals from an order of the Supreme Court at Special Term in New York County, which denied his motion for an order quashing or, in the alternative, modifying a subpoena duces tecum issued to him by respondent Committee on Unlawful Practice. The appeal was transferred to this Court from the Appellate Division of the Supreme Court in the First Judicial Department pursuant to CPLR 5711.

The petitioner, according to his affidavit submitted in support of the motion, is a licensed life insurance agent and broker, is not a lawyer and has long been "engaged in the business of pension and profit sharing planning", presently with offices in New York County. The respondent Committee on Unlawful Practice of the Law of the New York County Lawyers' Association caused the subpoena now in question to be issued over the signature of its attorney, that of the Clerk of the Appellate Division and the printed attestation of the Presiding Justice and caused it to be served upon petitioner, who was thereby directed to appear before a subcommittee of respondent "to testify and give evidence in a certain investigation now being conducted by said Committee with regard to the practice of CHARLES A. A'HEARN [petitioner] and others in Violation

of Sections 90 and 750B of the Judiciary Law of the State of New York". The subpoena required, also, that petitioner produce copies of advertisements placed by him offering his "services in connection with pensions, pension plans, profit sharing plans, stock pension plans and deferred compensation plans of every nature and description between January 1, 1966 and May 31, 1967"; as well as copies of brochures and similar writings issued or distributed by him during the same period, and, finally, copies of pension and other plans prepared by him, copies of agreements made by him with his customers and various business records and files.

The subpoena was issued in purported compliance with Rule XII-A of the Special Rules of the Appellate Division First Department in Regard to Conduct of Attorneys, providing as follows:

> Rule XII-A. *Preliminary Investigation of Persons, Firms or Corporations Unlawfully Practicing or Assuming to Practice Law.* Upon application by the Chairman or Acting Chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, the Association of the Bar of the City of New York, or the Bronx County Bar Association, disclosing that such Committee has reason to believe that a person, firm or corporation is unlawfully practicing or assuming to practice law, and that such Committee desires that an investigation thereof be conducted, or upon application by any such person, firm or corporation under such investigation, the clerk of this court shall issue subpoenas in the name of the Presiding Justice for the attendance of witnesses and production of books and papers before such Committee, or any subcommittee of such Committee designated in such application at the time and place within the First Judicial Department that said Committee or subcommittee regularly meets.

Appendix A

> Each Committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses who may be sworn by any person authorized by law to administer oaths.

The subpoena now under attack was issued following an exchange of letters between the parties, commencing with the Subcommittee's letter of November 21, 1966, stating that the services offered by petitioner to the public "in the designing and drafting of pension, profit-sharing, and employee benefit plans and programs" may constitute the unauthorized practice of law, within the prohibitions of sections 270 and 280 of the Penal Law and subdivision B of section 750 of the Judiciary Law, and requesting that petitioner arrange to meet with the Subcommittee to "discuss and supply a representative sampling of" advertisements, records and other papers of the nature subsequently specified in the subpoena. The correspondence concluded with a letter from petitioner to the Subcommittee, dated December 27, 1966, stating that petitioner had "no desire to cooperate with a Committee unwilling to state its aims, purposes and objectives", although these would appear evident from the prior correspondence if they were not, indeed, reasonably inferable from the Committee's title.

In its application to the Appellate Division for the issuance of the subpoena, the Committee stated, substantially in the language of Rule XII-A: "This application is made by reason of the fact that the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association has cause to believe that the above named party [petitioner] is unlawfully practicing or assuming to practice law and said committee desires to conduct an investigation thereof."

The thrust of petitioner's primary attack is to the authority upon which the subpoena is purportedly based; but

we can examine petitioner's contention that no authority exists only by first exploring the sources of the court's power generally, in respect of nonlawyers assuming to practice law. Such power clearly exists, being conferred by the provision that: "The supreme court shall have power and control over attorneys and counsellors-at-law *and* all persons practicing or assuming to practice law." (Judiciary Law, § 90, subd. 2; emphasis supplied.) Implementation of the power is provided with equal clarity by subdivision B of section 750 of the Judiciary Law, which states: "B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state." The court's specific powers, in these and other respects, are complemented and implemented by the provisions of Section 216 of the Judiciary Law, headed, "Additional powers and duties of the appellate divisions", which, so far as here pertinent, provides that: "In addition to the powers and duties elsewhere enumerated in this chapter, each appellate division, with respect to the courts in its department, shall have power to: 1. Adopt, promulgate, supplement, rescind and modify rules and orders necessary to implement its powers and duties hereunder including the supervision of the administration and operation of the courts in its department, not inconsistent with any statute hereafter adopted and the standards, policies, rules and orders of the administrative board."

It was, of course, to effectuate these powers, as granted by sections 90, 750 and 216, that rule XII-A, concerning,

among other things, the investigation of any "person, firm or corporation * * * unlawfully practicing or assuming to practice law", was promulgated. So clearly does the quoted reference include nonlawyers "practicing or assuming to practice law" that we mention only in passing petitioner's insubstantial contention to the contrary, predicated on the perhaps inappropriate placement of rule XII-A, a later promulgation, in Part 4 of the special rules, headed "Attorneys", in which it is (by rule I) provided that the "rules shall apply to attorneys and counsellors-at-law who have their offices in the First Judicial Department." The appellate division's right to exert control in this field, whether by rule XII-A or otherwise, being thus established, we turn to the subsidiary issue of the subpoena power asserted in furtherance of such control.

Essentially, petitioner's argument is that the purported power of subpoena so plainly conferred by rule XII-A is ineffective because unauthorized by statute. The general statutory power is to be found in section 2-b of the Judiciary Law providing that, "A court of record has power 1. to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court". Petitioner contends, first, that here the subpoena was not issued in a pending action or proceeding, i.e., "a cause pending" in the Appellate Division, and, second, that this provision of section 2-b must be read with that of CPLR 2302 (subd. [a]), authorizing the issuance of subpoenas "without a court order by the clerk of the court", with the effect, in petitioner's view, of limiting the clerk's power—which is, of course, the court's power—to issue subpoenas only in "a cause pending". Reason and precedent alike deny so narrow a view of the court's authority. It is true that the present inquiry is not a judicial proceeding in the ordinary sense. However, it differs in no material particular from the ambulance chasing investiga-

tions of the past and the present, in which the power of subpoena is implicit. Like them, it is "[a] preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right * * * It is a quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter (Cf. *Matter of Richardson,* 247 N. Y. 401, at pp. 413, 418). The closest analogue is an inquisition by the grand jury for the discovery of crime." (*People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 479.) From our conclusion that the Appellate Division had the right to order, conduct or sanction the investigation undertaken by respondent, the court's power of subpoena follows as a matter of course. (*People ex rel. Karlin* v. *Culkin, supra; Matter of Bar Assn. of City of N. Y.,* 222 App. Div. 580, 590; *Matter of Brooklyn Bar Assn.,* 19 Misc. 2d 491.)

It is further argued, in answer to appellant's contentions, that section 2-b of the Judiciary Law does not restrict or limit the operation of CPLR 2302 (subd. [a]) and that the clerk was authorized to act under subdivision (a), whether or not there was "a cause pending" and, indeed, could have acted pursuant to inherent authority (8 Wigmore, Evidence [3d ed.], § 2195, p. 78) exercised in aid of the court's inherent power to investigate matters concerning the practice of law (*Matter of Bar Assn. of City of N. Y., supra,* pp. 586-590); and it is further asserted that, within the contemplation of the statutory subpoena power, the investigation is, in fact and in law, a proceeding and "a cause pending", commenced simply by respondent's application for the subpoena, as would have been the case in a Grand Jury investigation, which *Karlin* (*supra,* p. 479) found analogous (cf. *People ex rel. Van Der Beek* v. *McCloskey,* 18 A D 2d 205); but the determination which we have reached on broader grounds renders consideration of these additional contentions unnecessary.

Petitioner's final attack is directly upon the rule itself. He contends that rule XII-A, unless construed to apply only to pending actions or proceedings, contravenes his rights and immunities under the Federal and State Constitutions. He stresses, in particular, the supposed violation of the prohibition against unreasonable searches and seizures imposed by the Fourth Amendment to the Constitution of the United States (and by section 12 of article I of the Constitution of the State of New York) arising out of the issuance of the subpoena without a prior showing of good cause. As to this, appellant contends that respondent Committee's unverified and factually unsupported statements in its letter to the Appellate Division that the Committee "has cause to believe that [petitioner] is unlawfully practicing or assuming to practice law and said committee desires to conduct an investigation thereof" fail to demonstrate good cause.

We find nothing in the constantly expanding body of the pertinent decisional law constraining us to impose upon a judicial inquiry under section 90 of the Judiciary Law the rigid test or good cause standard for which appellant contends; nor do we perceive any element of public policy pointing to the necessity of such a requirement in this or future cases. Section 90 vests the court with broad supervisory authority over persons who practice or assume to practice law. Recognizing this authority and the further responsibility imposed by subdivision B of section 750, it would be unreasonable indeed to deny to the court inquisitorial powers at least equal to those possessed by a Grand Jury and by the Attorney General (Judiciary Law, § 476-c; and see, e.g., *Dunham* v. *Ottinger*, 243 N. Y. 423, app. dsmd. 276 U. S. 592). The objection urged by this appellant was advanced and overruled in the recent case of *United States* v. *Powell* (379 U. S. 48), in which Powell, in resisting a subpoena of certain tax records by the Commissioner of

Internal Revenue, contended unsuccessfully that the Government was required to make a showing of probable cause for suspecting fraud, the court holding (p. 57): "This view of the statute is reinforced by the general rejection of probable cause requirements in like circumstances involving other agencies. In Oklahoma Press Pub. Co. v. Walling, 327 U. S. 186, 216, * * * in reference to the Administrator's subpoena power under the Fair Labor Standards Act, the Court said 'his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations,' and accordingly applied the view that inquiry must not be ' "limited * * * by * * * forecasts of the probable result of the investigation." ' In United States v. Morton Salt Co., 338 U. S. 632, 642-643, * * * the Court said of the Federal Trade Commission, 'It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called in question." Apropos is the court's footnote citation of 1 Davis, Administrative Law, § 3.12 (1958).

The case law in New York seems to be in accord with this Federal approach. (See, e.g., *Dunham* v. *Ottinger,* 243 N. Y. 423, app. dsmd. 276 U. S. 592, *supra; Matter of Dairymen's League Co-op. Assn.* v. *Murtagh,* 274 App. Div. 591, affd. 299 N. Y. 634.) All the investigative body need

establish on a motion to quash is that the materials sought are reasonably related to the matter being investigated and to the public purpose sought to be achieved. (*Matter of LaBelle Creole Int., S. A.* v. *Attorney-General of State of N. Y.*, 10 N Y 2d 192, 196, mot. for rearg. den. 10 N Y 2d 1011; and see *Matter of Ryan* v. *Lefkowitz*, 26 A D 2d 604, affd. 18 N Y 2d 977; *Matter of Dawn Operators* v. *Lyon*, 283 App. Div. 358, mot. for lv. to app. den. 306 N. Y. 977, app. dsmd. 307 N Y 673; *Matter of Prestige Sewing Stores of Queens* v. *Lefkowitz*, 54 Misc 2d 188; *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 208-209.) These prerequisites have been established; indeed, they are self-evident. Appellant's argument predicated on unlawful search and seizure accordingly fails. He seems not to press his additional contentions of deprivation of other constitutional rights; there is some doubt whether they are properly before us, but we have considered them, nevertheless, and find none of substantial merit.

The dissent relies in some part on *Matter of Dawn Operators* v. *Lyon* (*supra*) but, as hereinbefore indicated, *Dawn* seems to us to support, instead, the contrary conclusion at which we have arrived. There, the essential basis of the attack was "that the naked subpoena on its face fails to show that the inquiry comes within the range of the superintendent's authority" (p. 360); and, after validating that contention, but upholding the subpoena on the basis of extrinsic proof, Justice Bergan wrote, "It is not amiss to point out that the judicial proceeding in this matter might have been avoided had respondent followed the preferable practice of disclosing on the face of the subpoena the relevancy of the examination sought to some inquiry within his province" (p. 361). In the case before us the subpoena is by no means "naked"; and on its face the relevancy of the contemplated examination to an authorized inquiry into unlawful practice of the law was clearly dis-

closed. In *Dawn,* the reference was to "matters relating to the conduct and *affairs generally* of *John Doe* and others" (emphasis supplied); here it was to "a certain investigation now being conducted by said Committee with regard to the practice of CHARLES A. A'HEARN and others in Violation of Sections 90 and 750B of the Judiciary Law of the State of New York". Clearly, it seems to us, this language satisfies the rule of *Dawn;* and this independently of the parties' prior correspondence, which disclosed the purposes of, and authority for the inquiry and petitioner's recognition thereof, implicit, indeed, in his affirmative statement, "I assure you I am not engaged in the practice of the law." Also inapropos, in our view, is the dissent's citation of *Matter of Sun-Ray Cloak Co.* (256 App. Div. 620) involving a subpoena duces tecum issued, with no showing of materiality or necessity, by an arbitrator, "not a public or a judicial officer", to a witness not a party to the arbitration agreement (p. 624). In further reference to the dissent, we cannot concede the validity of the distinction there made with respect to the *Oklahoma Press* and *Powell* line of cases (374 U. S. 186; 379 U. S. 48, *supra*), inasmuch as it appears that in *Ryan* v. *United States* (379 U. S. 61), the companion case to *Powell,* the same flexible standard of reasonableness discussed in the dissent was applied to the issuance of a subpoena for the records of an individual (see, also, *Matter of Ryan* v. *Lefkowitz,* 26 A D 2d 604, affd. 18 N Y 2d 977).

It by no means follows, however, that appellant is without adequate or meaningful protection. The court, inherently and by statute, possesses the right, which it will ever be quick to exercise, to protect against the abuse of its process and the oppressive or arbitrary utilization thereof by the investigator. Petitioner on his present application, of course, resists the production of any evidence at all and our affirmance of Special Term's proper denial of the total relief sought should not foreclose him, upon obedience to

the terms of the subpoena generally, from moving with respect to any specific item or items of the evidence directed to be produced, upon a particularized and "sufficient showing of oppression or undue hardship". (*Matter of Beatty* v. *Commission of Investigation of State of N. Y.*, 16 A D 2d 1021, affd. 12 N Y 2d 685; and see CPLR 2304; *United States* v. *Powell*, 379 U. S. 48, 58, *supra;* 1 Pomeroy, Equity Jurisprudence [5th ed.], § 204, p. 334.)

The order should be affirmed, without costs.

Dissenting Opinion.

HERLIHY, J. (dissenting):

The petitioner is not a lawyer, but it would appear that he is suspect of a charge of unlawfully practicing law in violation of sections 90 and 750[B] of the Judiciary Law of the State of New York.

That the court has the power to issue the subpoena is academic and requires no comment.

However, in the present case the petitioner in his contentions as to the violation of his constitutional rights raises the more fundamental issue as to whether or not this was a proper case for the exercise of the subpoena power. Whatever presumption of regularity might be otherwise indulged in is inapplicable in the present proceeding.

It is to be firstly noted that the present subpoena would appear to have been improperly issued by the clerk of the court since the application failed to disclose that the applicant had any reason to believe the petitioner was practicing or assuming to practice law. I am aware that the unverified application of the respondent states that it "has cause to believe", but the rule pursuant to which this subpoena was issued would appear to require an application "disclosing * * * reason to believe" that speci-

fied unlawful conduct is being pursued. The application for the subpoena discloses nothing beyond a desire to investigate nor did the respondent's affidavit on the motion.

In *Matter of Dawn Operators* v. *Lyon* (283 App. Div. 358, 359, mot. for lv. to app. den. 306 N. Y. 977, app. dsmd. 307 N. Y. 673) the First Department in an unanimous opinion by Mr Justice Bergan stated: "The subpoena power does not operate in a vacuum but always in the context of a relevancy to the effective pertinent duty of the officer or body authorized to subpoena and examine witnesses." Presently the application for the subpoena was not verified, did not set forth facts, nor did it set out the source of respondent's belief that the appellant was unlawfully practicing law. In short, there was no proof that the appellant was doing anything wrong. The affidavit in opposition to the motion to quash, as distinguished from the one in *Dawn,* gave no facts, set forth no source of information or in any respect gave a basis for the relief requested by the respondent.

In *Matter of Anonymous* v. *Arkwright* (5 A D 2d 792) there was an investigation ordered by the court and the analogy of that situation to the present situation by the majority is misleading. In *Matter of Bar Association of City of New York* (222 App. Div. 580) the First Department considered a petition for an inquiry into "ambulance chasing" and after deciding that it had such power, ordered an investigation as a result of the facts alleged in the petition. In the present case it is not clear that the subpoena was issued in connection with a general investigation of those persons involved in the creating of employment benefit programs and in any event, it was not issued pursuant to any directive of the First Department to investigate such plans or planners.

In my opinion, a motion to quash a subpoena in civil matters necessitates a disclosure by the issuing authority

that there is some rational connection between the person or material sought and the duty being carried out by such procedure. (See *Matter of Dawn Operators* v. *Lyon, supra;* [compare subpoena there questioned with the present subpoena] *Matter of Sun-Ray Cloak Co., Inc.,* 256 App. Div. 620, 625.) The motion to quash was denied in *Dawn* because the court found that the affidavit of the Superintendent of Banks contained specific allegations of alleged transactions involving *Dawn.* A sufficient showing might be very slight in terms of evidentiary matters, but the present record contains nothing to create even a suspicion that the petitioner has been engaged in dispensing legal advice. The affidavit submitted on behalf of the respondent in this proceeding is an indulgence in generalities rather than specifics and makes the presumptuous statement that by definition, services rendered in regard to—"pension plan, profit sharing plan, stock plan and other employee benefit programs"—involve the "rendition of legal advice and the performance of legal services." Upon appellant's request for advice as to whether the investigation was directed against him personally or was an "in-depth study" of such plan, the Committee refused to state its objective. It would seem that appellant was entitled to know whether he was to become a target of an investigation, the result of which, if found guilty, would subject him to a misdemeanor charge (former Penal Law, §§ 270, 272; now Judiciary Law, §§ 478, 485). The recital of mere suspicion followed by a declaration of purpose to investigate the correctness of such suspicion indicates a voyage of discovery that the law does not tolerate. (See *People ex rel. Livingston* v. *Wyatt,* 186 N. Y. 383, 391, 393 [1906]; also *Boyd* v. *United States,* 116 U. S. 616.)

Matter of Dawn Operators v. *Lyon* (*supra*) suggests that something more than a showing of naked power and jurisdiction is necessary for a "proper case". The require-

ment by the First Department's own rule that the application for a subpoena *disclose* reasons to believe that the prohibited conduct is being pursued, indicates that a subpoena was not to be issued except upon a factual showing of unlawful practice against the person subpoenaed, but, under any circumstances, when a subpoena is challenged, the supporting affidavits must set forth relevant facts. Special Term seems to have assumed such facts.

The courts are the protectors of the rights and privileges of individuals such as A'Hearn and there is a valid distinction between his rights and those of a corporation. In *Oklahoma Press Pub. Co.* v. *Walling* (327 U. S. 186), the Court established a flexible standard of probable cause to satisfy the requirements of the Fourth Amendment applicable when a subpoena duces tecum issued. The Court said (at 208)

> "Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection, by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described', if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable."

It is important to note that the Court's decision was limited to obtaining corporate records (see *Oklahoma Press Pub. Co.* v. *Walling, supra,* at 204-208). Subsequent deci-

sions of the Court have indicated that the flexible standard of reasonableness announced in *Oklahoma Press Pub. Co.* was limited to the issuance of subpoenas for corporate records (cf. *United States* v. *Morton Salt Co.*, 338 U. S. 632, 651-652; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 727). Thus the majority's reliance on *United States* v. *Powell* (379 U. S. 48), a corporate records case, is misplaced. Moreover, in *Powell* the government sought to obtain what would appear to be "required records", that is, records that a taxpayer is obliged to keep and which therefore the government has the right to inspect (cf. *Shapiro* v. *United States*, 335 U. S. 1, 17-19, 33-34), which is an additional reason for distinguishing *Powell* from the present case. The validity of the distinction between corporate and individual business records as a general proposition is not weakened by the case of *United States* v. *Ryan* (379 U. S. 61). *Ryan*—a proceeding for judicial enforcement of an Internal Revenue Service administrative summons—like *Powell*, was a "required records" case and therefore its holding does not invalidate or dilute the distinction between corporate and individual records which are not "required records" and *Ryan*, then, like *Powell* has no application to the case at bar.

What has been stated herein should in no way be construed as necessarily applicable to attorneys and counselors at law duly admitted to practice before the courts of this State and thereby becoming officers of said courts.

Under the circumstances of this case, there being a failure to show any cause, "probable or otherwise", for the attendance of the petitioner or for the production of his records, the motion to quash should have been granted, without prejudice to the issuance of another subpoena duces tecum upon another application showing additional facts which establish that the case is a proper one for the exercise of the clerk's power as delegated by the First Department.

Appendix A

Memorandum Decision, Special Term, Part I, Mr. Justice Samuel Spiegel. New York Law Journal, December 17, 1967, page 17, cols. 5-6.

MATTER OF A'HEARN (Committee on Unlawful Practice of Law of the New York County Lawyers' Association)—Petitioner moves for an order quashing a subpoena duces tecum dated September 21, 1967, issued by the respondent committee to the petitioner and returnable before a subcommittee of the respondent Committee on Unlawful Practice of the Law, or, in the alternative, for an order modifying the subpoena duces tecum by striking out subparagraphs 2, 3, 4 and 5 thereof.

As early as November 21, 1966, respondent initiated an investigation into the matter of the offering to the public of services in the designing and drafting of pension, profit-sharing, and employee benefit plans and programs. This was made known to the petitioner by letter of November 21, 1966. Petitioner concedes he is engaged in the business of pension and profit-sharing planning, all of which may include the practice of law in the giving of legal advice and formulation of legal documents. To assist in such investigations, the respondent applied for and secured the issuance of the subject subpoena duces tecum dated September 21, 1967, witnessed in the name of the Presiding Justice of the Appellate Division, Supreme Court, First Department, and signed in behalf of the respondent and by the clerk of the Appellate Division, First Department.

Pursuant to Judiciary Law, section 90(2), as amended, the Supreme Court has power and control not only over attorneys but over those assuming to practice law. The powers conferred by Judiciary Law, section 750-B, include the power to institute a proceeding on the court's motion or on the motion of an officer charged with the duty to investigate unlawful practice of law or by any Bar Association incorporated under New York State law. Judiciary Law, section 2(b), confers on the Supreme Court not only the general power to issue a subpoena in a pending action

or proceeding, but in addition "to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it." The Appellate Divisions are empowered to "Adopt, promulgate, supplement, rescind and modify rules and orders *necessary to supplement its powers and duties hereunder,* including the supervision of the administration and operation of the courts in its department, not inconsistent with any statute hereafter adopted and the standards, policies, rules and orders of the administrative board." Pursuant thereto, Rule XII-A under part 4 of the Rules of the Appellate Division, First Department, was promulgated as follows: "Upon application by the chairman or acting chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, the Association of the Bar of the City of New York, or the Bronx County Bar Association, *disclosing that such committee has reason to believe* that a person, firm or corporation is unlawfully practicing or assuming to practice law, and that such committee *desire that an investigation thereof be conducted,* or upon application by any such person, firm or corporation under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and production of books and papers before such committee, or any subcommittee of such committee designated in such application at the time and place within the First Judicial Department that said committee or subcommittee regularly meets." Thus, the alleged assumed or unlawful practice of law may be investigated as well as unprofessional conduct.

There is thus presented a fully-integrated authorization to exercise power and control over the practice of law licensed and unlicensed together with the implementation thereof both as to investigation and discipline by statute and rule, all within the powers conferred.

The power to initiate is with the respondent. Since it did initiate the proceeding herein, the matter is sub judice through its enforcing arm (see Matter of the Association of the Bar of the City of New York, 222 App. Div. 580). It is sufficient that, in applying for issuance of the subpoena, respondent disclosed reason to believe the existence of a violation of the Judiciary Law, warranting implementation of the investigation into the conduct of petitioner's business as violative of the Judiciary Law.

With respect to the items of the subpoena the documents and writings to be produced are directly related to the matter under investigation. The time limitation of item 5 is the reasonable time limitation as indicated in items 1 through 4. Production may be made at the situs or at stages of progress. If in a proper case it appears the books and papers are material and relevant and there is authority for its issuance, the subpoena is proper (Matter of Foster, 139 App. Div. 769).

The motion is denied. Settle order. If the parties cannot agree on a date for compliance, the court will set the date in the order.

APPENDIX B

Judgment on Order of Court of Appeals.

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 23rd day of January in the year of our Lord one thousand nine hundred and sixty-nine, before the Judges of said Court.

WITNESS,

The Hon. STANLEY H. FULD,
Chief Judge, *Presiding.*

RAYMOND J. CANNON,
Clerk.

REMITTITUR: January 23, 1969

(Caption)

BE IT REMEMBERED, That on the 20th day of September in the year of our Lord one thousand nine hundred and sixty-eight, Charles A. A'Hearn, the appellant—in this cause, came here unto the Court of Appeals, by Vollmer, Wildermuth & McCarty, his attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Committee of Unlawful Practice of the Law of the New York County Lawyers' Association, the respondent—in said cause, afterwards appeared in said Court of Appeals by Daniel M. Shientag, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Charles M. McCarty, of counsel for the appellant—, and by Mr. Daniel M. Shientag, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, without costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, without costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON,
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS,

CLERK'S OFFICE,

Albany, January 23, 1969.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON,
Clerk.

Pursuant to order of the Court of Appeals, dated April 9, 1969, the judgment or order of the Court of Appeals was amended to state:

"Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Petitioner-appellant contended that Rule XII-A of the Part 4 Rules of the

Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the subpoena *duces tecum* issued to petitioner-appellant pursuant to such Rule, violate his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. The Court of Appeals considered these questions and held that there was no denial of any constitutional right of petitioner-appellant."

APPENDIX C

Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States.

AMENDMENT [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Appendix C

AMENDMENT [VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

* * * * * *

AMENDMENT [XIV.]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Court Rules.

Appellate Division, Supreme Court, State of New York
First Judicial Department

PART 4—ATTORNEYS

Rule I. Application

These rules shall apply to attorneys and counselors-at-law who have their offices in the First Judicial Department. If the office of an attorney is not within the First Judicial Department, he shall nevertheless be subject to these rules with respect to each action or proceeding commenced in the First Judicial Department.

* * * * * *

Appendix C

Rule XII. Preliminary Investigation of Professional Misconduct on the Part of an Attorney. Subpoenas and Examination of Witnesses Under Oath

Upon application by the chairman or acting chairman of the Committee on Grievance of the Association of the Bar of the City of New York, or the Committee on Discipline of the New York County Lawyers' Association, or the Committee on Grievances of the Bronx County Bar Association, or the Co-Ordinating Committee on Discipline, disclosing that such committee is conducting a preliminary investigation of professional misconduct on the part of an attorney, or upon application by an attorney under such investigation, the clerk of this court shall issue subpoenas in the name of the presiding justice for the attendance of witnesses and production of books and papers before such committee, or any subcommittee of such committee, designated in such application, at the time and place within the First Judicial Department that said committee, or subcommittee, regularly meets.

Each committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses, who may be sworn by any person authorized by law to administer oaths.

Rule XII-A. Preliminary Investigation of Persons, Firms or Corporations Unlawfully Practicing or Assuming to Practic Law

Upon application by the Chairman or Acting Chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, the Association of the Bar of the City of New York, or the Bronx County Bar Association, disclosing that such Committee has reason to believe that a person, firm or corporation is unlawfully practicing or assuming to practice law, and that such Committee desires that an investigation thereof be con-

ducted, or upon application by any such person, firm or corporation under such investigation, the clerk of this court shall issue subpoenas in the name of the Presiding Justice for the attendance of witnesses and production of books and papers before such Committee, or any subcommittee of such Committee designated in such application at the time and place within the First Judicial Department that said Committee or subcommittee regularly meets.

Each Committee or subcommittee conducting such a preliminary investigation is empowered to take and transcribe the evidence of witnesses who may be sworn by any person authorized by law to administer oaths.

APPELLATE DIVISION, SUPREME COURT, STATE OF NEW YORK
SECOND JUDICIAL DEPARTMENT

PART 691

CONDUCT OF ATTORNEYS AND COUNSELORS AT LAW

SECTION 691.1 APPLICATION. These rules shall apply to attorneys and counselors at law who have their offices in the second judicial department. If the office of an attorney is not within the second judicial department, he shall nevertheless be subject to these rules with respect to each action or proceeding commenced in the second judicial department.

* * * * * * *

SECTION 691.13 PRELIMINARY INVESTIGATION OF ANY PARTY *Unlawfully Practicing Law or Assuming to Practice Law.*

(a) Upon application by the chairman or acting chairman of the committee or sub-committee on unlawful practice of the law of any recognized bar association in any county in the Second Judicial Department, alleging that such committee or sub-committee has reasonable cause to believe that any party (to wit: any person, firm, corporation or other organization) is unlawfully practicing law or unlawfully assuming to practice law or is engaging in any business or activity which may involve the unlawful

practice of law, and further alleging that such committee or sub-committee is conducting or intends to conduct an investigation with respect to such practice, business or activity, the clerk of this court is empowered and authorized to issue, in the name of the presiding justice of the court, subpoenas directing the attendance of witnesses and the production of books, papers and records before such committee or sub-committee at the time when and at the place where it will convene. The clerk of the court is also empowered and authorized to issue such subpoenas upon the application of any such party.

(b) Every committee or sub-committee conducting such preliminary investigation is empowered to take the testimony of witnesses under oath and to transcribe such testimony. Such witnesses may be sworn by any person authorized by law to administer oaths.

Statutes.

STATE OF NEW YORK
CIVIL PRACTICE LAW AND RULES
McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
BOOKS 7B

§ 102. AMENDMENT, RESCISSION OR ADOPTION OF RULES

The civil practice rules are herein designated "rule". Any rule in this chapter may be amended, or rescinded, or additional civil practice rules may be adopted, not inconsistent with the constitution or statutes, pursuant to subdivision three of section two hundred twenty-nine of the judiciary law, or by act of the legislature. No rule so amended, rescinded or adopted shall abridge or enlarge the substantive rights of any party.

* * * * * *

§ 105. DEFINITIONS

(a) Applicability. Unless the context requires otherwise, the definitions in this section apply to the civil practice law and rules.

(b) Action and special proceeding. The word "action" includes a special proceeding; the words "plaintiff" and "defendant" include the petitioner and the respondent, respectively, in a special proceeding; and the words "summons" and "complaint" include the notice of petition and the petition, respectively, in a special proceeding.

* * * * * *

(d) Civil judicial proceeding. A "civil judicial proceeding" is a prosecution, other than a criminal action, of an independent application to a court for relief.

* * * * * *

§ 304. METHOD OF COMMENCING ACTION OR SPECIAL PROCEEDING

An action is commenced and jurisdiction acquired by service of a summons. A special proceeding is commenced and jurisdiction acquired by service of a notice of petition or order to show cause.

* * * * * *

§ 2302. AUTHORITY TO ISSUE

(a) Without court order. Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required.

Appendix C

CODE OF CRIMINAL PROCEDURE

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNCTATED
BOOK 66, PART I

§ 5. CRIMINAL ACTION DEFINED

The proceeding, which a party charged with an offense is accused and brought to trial and punishment, is known as a criminal action.

Judiciary Law.

McKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED
BOOKS 29

§ 2-b. GENERAL POWERS OF COURTS OF RECORD

A court of record has power

1. to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court, subject, however, to the limitations prescribed by law with respect to the portion of the state in which the process of the local court of record may be served;

* * * * *

§ 90. ADMISSION TO AND REMOVAL FROM PRACTICE BY APPELLATE DIVISION; CHARACTER COMMITTEES

1. a. Upon the state board of law examiners certifying that a person has passed the required examination, or that the examination has been dispensed with, the appellate division of the supreme court in the department to which such person shall have been certified by the state board of law examiners, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law in all the courts of this state, provided that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

b. Upon the application, pursuant to the rules of the court of appeals, of any person who has been admitted to practice law in another state or territory or the District of Columbia of the United States, or in a foreign country, to be admitted to practice as an attorney and counsellor-at-law in the courts of this state without taking the regular bar examination, the appellate division of the supreme court in the department in which such person is an actual resident at the time of such application, if it shall be satisfied that such person possesses the character and general fitness requisite for an attorney and counsellor-at-law, shall admit him to practice as such attorney and counsellor-at-law, in all the courts of this state, provided, that he has in all respects complied with the rules of the court of appeals and the rules of the appellate divisions relating to the admission of attorneys.

c. The members of the committee appointed by the appellate division in each department to investigate the character and fitness of applicants for admission to the bar, shall be entitled to their necessary traveling, hotel and other expenses, incurred in the performance of their duties, payable by the state out of moneys appropriated therefor, upon certificate of the presiding justice of the appellate division by which such committee is appointed.

d. The committee on character and fitness appointed by the appellate division of the supreme court in the first judicial department and the committee on character and fitness appointed by the appellate division of the supreme court of the second judicial department, may each, with the written consent of the justices of each of such appellate divisions or a majority of such justices, acting for their respective appellate divisions, from time to time, appoint and remove a secretary, stenographers and assistants, and procure a suitable office for each committee, properly furnished and equipped and all books, stationery, blanks, postal cards, expressage and postage

stamps as shall be required for the proper performance of the duties of each such committee.

e. The salaries of such secretary, stenographers and assistants shall be fixed for each department by the justices of the appellate division in each department or a majority of them in each department.

f. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the first judicial department, shall, in the said first judicial department, be paid by the comptroller of the city of New York.

g. The salaries of such secretary, stenographers and assistants and the necessary expenses under the terms of this act in the second judicial department shall be certified by the presiding justice of such department to the state comptroller who shall audit the same. The state department of taxation and finance shall pay such salaries and expenses and shall apportion the same among the counties comprising the second judicial department. Such counties shall reimburse the state for such compensation. The time and method of such apportionment and the time and method of such reimbursement shall be as specified in section seventy-four of this chapter.

2. The supreme court shall have power and control over attorneys and counsellors-at-law and all persons practicing or assuming to practice law, and the appellate division of the supreme court in each department is authorized to censure, suspend from practice or remove from office any attorney and counsellor-at-law admitted to practice who is guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or sup-

pression of any information in connection with the application for admission to practice.

It shall be the duty of the appellate division to insert in each order of suspension or removal hereafter rendered a provision which shall command the attorney and counsellor-at-law thereafter to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another. In addition it shall forbid the performance of any of the following acts, to wit:

a. The appearance as an attorney or counsellor-at-law before any court, judge, justice, board, commission or other public authority.

b. The giving to another of an opinion as to the law or its application, or of any advice in relation thereto.

In case of suspension only, the order may limit the command to the period of time within which such suspension shall continue, and if justice so requires may further limit the scope thereof.

If an attorney and counsellor-at-law has been heretofore removed from office, the appellate division shall upon application of any attorney and counsellor-at-law, or of any incorporated bar association, and upon such notice to the respondent as may be required, amend the order of removal by adding thereto as a part thereof, provisions similar to those required to be inserted in orders hereafter made.

If a certified copy of such order or of such amended order, be served upon the attorney and counsellor-at-law suspended or removed from office, a violation thereof may be punished as a contempt of court.

3. The suspension or removal of an attorney or counsellor-at-law, by the appellate division of the supreme court, operates as a suspension or removal in every court of the state.

4. Any person being an attorney and counsellor-at-law, who shall be convicted of a felony, shall, upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Whenever any attorney and counsellor-at-law shall be convicted of a felony, there may be presented to the appellate division of the supreme court a certified or exemplified copy of the judgment of such conviction, and thereupon the name of the person so convicted shall, by order of the court, be struck from the roll of attorneys.

5. Upon a reversal of the conviction for felony of an attorney and counsellor-at-law, or pardon by the president of the United States or governor of this state, the appellate division shall have power to vacate or modify such order or debarment.

6. Before an attorney or counsellor-at-law is suspended or removed as prescribed in this section, a copy of the charges against him must be delivered to him personally within or without the state or, in case it is established to the satisfaction of the presiding justice of the appellate division of the supreme court to which the charges have been presented, that he cannot with due diligence be served personally, the same may be served upon him by mail, publication or otherwise as the said presiding justice may direct, and he must be allowed an opportunity of being heard in his defense. In all cases where the charges are served in any manner other than personally, and the attorney and counsellor-at-law so served does not appear, an application may be made by such attorney or in his behalf to the presiding justice of the appellate division of the supreme court to whom the charges were presented at any time within one year after the rendition of the judgment, or final order of suspension or removal, and upon good cause shown and upon such terms as may be deemed just by such presiding justice, such attorney and

counsellor-at-law must be allowed to defend himself against such charges.

The justices of the appellate division in any judicial department, or a majority of them, may make an order directing the expenses of any disciplinary proceedings, and the necessary costs and disbursements of the petitioner in prosecuting such charges, including the expense of any preliminary investigation in relation to professional conduct of an attorney and counsellor-at-law, to be paid by the county treasurer of a county within the judicial department, which expenses shall be a charge upon such county.

7. In addition to the duties prescribed by section seven hundred of the county law, it shall be the duty of any district attorney within a department, when so designated by the justices of the appellate division of the supreme court in such department, or a majority of them, to prosecute all proceedings for the removal or suspension of attorneys and counsellors-at-law or the said justices, or a majority of them may appoint any attorney and counsellor-at-law to conduct a preliminary investigation and to prosecute any disciplinary proceedings and, during or upon the termination of the investigation or proceedings, may fix the compensation to be paid to such attorney and counsellor-at-law for the services rendered which compensation shall be a charge against the county specified in his certificate and shall be paid thereon.

8. Any petitioner or respondent in a disciplinary proceeding against an attorney or counsellor-at-law under this section, including a bar association or any other corporation or association, shall have the right to appeal to the court of appeals from a final order of any appellate division in such proceedings upon questions of law involved therein, subject to the limitations prescribed by article six, section seven, of the constitution of this state.

9. No objection shall be taken to the appointment of any member of the bar to act as referee or judge in a disciplinary proceeding under this section on the ground that he is a member of a bar association or other corporation or association which is the petitioner therein.

10. Any statute or rule to the contrary notwithstanding, all papers, records and documents upon the application or examination of any person for admission as an attorney and counsellor at law and upon any complaint, inquiry, investigation or proceeding relating to the conduct or discipline of an attorney or attorneys, shall be sealed and be deemed private and confidential. However, upon good cause being shown, the justices of the appellate division having jurisdiction are empowered, in their discretion, by written order, to permit to be divulged all or any part of such papers, records and documents. In the discretion of the presiding or acting presiding justice of said appellate division, such order may be made either without notice to the persons or attorneys to be affected thereby or upon such notice to them as he may direct. In furtherance of the purpose of this subdivision, said justices are also empowered, in their discretion, from time to time to make such rules as they may deem necessary. Without regard to the foregoing, in the event that charges are sustained by the justices of the appellate division having jurisdiction in any complaint, investigation or proceeding relating to the conduct or discipline of any attorney, the records and documents in relation thereto shall be deemed public records.

Appendix C

§ 216. ADDITIONAL POWERS AND DUTIES OF THE APPELLATE DIVISIONS

In addition to the powers and duties elsewhere enumerated in this chapter, each appellate division, with respect to the courts in its department, shall have power to:

1. Adopt, promulgate, supplement, rescind and modify rules and orders necessary to implement its powers and duties hereunder including the supervision of the administration and operation of the courts in its department, not inconsistent with any statute hereafter adopted and the standards, policies, rules and orders of the administrative board.

2. Delegate to the presiding justice or any administrative judge any administrative power and duty possessed by it, as well as authority to vary or modify rules and orders adopted under this section where strict adherence to them will inhibit, or where classification or differentiations to meet local situations will enhance, the effectuation of the purpose of article six of the constitution.

3. Supervise the preparation of the itemized estimates of the annual financial needs of the courts in its department for submission to the administrative board to be forwarded with the recommendations and comment of the board to the appropriate appropriating bodies; provided however, that in counties having an alternative form of county government, the itemized estimates of the annual financial needs of the courts in the county to be included in the county budget shall first be submitted to the elective

county executive who shall transmit to the appellate division for such submission to the administrative board, the amounts included in the budget he will submit to the board of supervisors for such purposes.

* * * * *

§ 229. ADDITIONAL POWERS AND DUTIES OF THE JUDICIAL CONFERENCE

In addition to the powers and duties elsewhere enumerated in this article the judicial conference shall have power to:

1. Receive and consider proposed changes in the civil practice law and rules, conduct studies and recommend such changes as are deemed necessary to modify or eliminate antiquated and inequitable statutes and rules, bring the civil practice law and rules into harmony with modern conditions, promote simplicity in procedure, the just determination of litigation, and the elimination of unjustifiable expense and delay.

2. Report its recommendations in relation to the statutory provisions of the civil practice law and rules annually to the legislature on or before February first, and, if it deems advisable, to accompany its recommendations with proposed bills to carry out any of its recommendations.

3. Adopt, amend, or rescind rules of civil practice in the civil practice law and rules except that such a rule shall not be inconsistent with the constitution or the statutes of the state and it shall neither abridge nor enlarge the substantive rights of any party. Rules of civil practice in the civil practice law and rules so adopted, amended or rescinded by the judicial conference shall be reported by it annually to the legislature on or before February first and unless such proposal as reported be disapproved by the legislature

by concurrent resolution adopted by it, or amended by law, any such change in the practice rules shall become effective on September first of that year. Any such change in the practice rules shall be published in the state bulletin before its effective date pursuant to section one hundred sixty of the executive law. The judicial conference may adopt such further means as it deems proper to insure effective publication.

* * * * * *

§ 476-a. ACTION FOR UNLAWFUL PRACTICE OF THE LAW

1. The attorney-general may maintain an action upon his own information or upon the complaint of a private person or of a bar association organized and existing under the laws of this state against any person, partnership, corporation, or association, and any employee, agent, director, or officer thereof who commits any act or engages in any conduct prohibited by law as constituting the unlawful practice of the law.

The term "unlawful practice of the law" as used in this article shall include, but is not limited to,

(a) any act prohibited by penal law sections two hundred seventy, two hundred seventy-a, two hundred seventy-e, two hundred seventy-one, two hundred seventy-five, two hundred seventy-five-a, two hundred seventy-six, two hundred eighty or fourteen hundred fifty-two, or

(b) any other act forbidden by law to be done by any person not regularly licensed and admitted to practice law in this state, or

(c) any act punishable by the supreme court as a criminal contempt of court under section seven hundred fifty-B of this chapter.

2. Such an action may also be maintained by a bar association organized and existing under the laws of the state

of New York, upon an application to the supreme court of the state of New York, or a justice thereof, for leave to bring the same by such bar association on good cause shown therefor and proof that a written request was made upon the attorney-general to bring such an action and that more than twenty days have elapsed since the making of such request and he has failed or refused to bring such an action.

* * * * * *

§ 476-c. INVESTIGATION BY THE ATTORNEY-GENERAL

1. The attorney-general is empowered to conduct an investigation of any complaint of unlawful practice of the law and in connection therewith, the attorney-general, his deputy, assistant, special assistant or other officer designated by him for such purpose is empowered to subpoena witnesses, compel their attendance, examine them under oath before him or the supreme court of the state of New York, or a justice thereof, and require the production of any books or papers which he deems relevant or material to the inquiry. Such power of subpoena and of examination shall not abate or terminate by reason of the commencement or pendency of any action or proceeding brought by the attorney-general under section four hundred seventy-six-a.

2. No person shall be excused from attending such inquiry in pursuance to the mandates of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee or mileage, unless at the time of such appearance or production, as the case may be, such witness makes demand for such payment as a condition precedent to the offering of testimony or production required by the subpoena and unless such payment is not thereupon made. Such provisions for payment of witness fee or mileage do not apply to any officer, director or per-

son in the employ of any person, partnership, corporation, company, trust or association whose conduct or practices are being investigated.

3. It shall be the duty of all public officers, their deputies, assistants, subordinates, clerks or employees and all other persons to render and furnish to the attorney-general, his deputy or other designated officer when requested all information and assistance in their possession or within their power. Any officer participating in such inquiry who shall disclose to any person other than the attorney-general the name of any witness examined or any other information obtained upon such inquiry except as directed by the attorney-general shall be guilty of a misdemeanor.

* * * * * * *

§ 478. PRACTICING OR APPEARING AS ATTORNEY-AT-LAW WITHOUT BEING ADMITTED AND REGISTERED

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state or in any court in the city of New York, or to furnish attorneys or counsel or an attorney and counsel to render legal services, or to hold himself out to the public as being entitled to practice law as aforesaid, or in any other manner, or to assume to be an attorney or counselor-at-law, or to assume, use, or advertise the title of lawyer, or attorney and counselor-at-law, or attorney-at-law or counselor-at-law, or attorney, or counselor, or attorney and counselor, or equivalent terms in any language, in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed

and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath and without having subscribed and taken the oath or affirmation required by section four hundred sixty-eight of the judiciary law and filed the same in the office of the clerk of the court of appeals as required by said section. Provided, however, that nothing in this section shall be held to apply (1) to officers of societies for the prevention of cruelty, duly appointed, when exercising the special powers conferred upon such corporations under section one hundred twenty-one of the membership corporations law; or (2) to law students in their senior or final year of law school acting under the supervision of a legal aid organization whose existence, organization or incorporation is approved by the appellate division of the supreme court of the department in which the principal office of such organization is located, when such students are acting under a program approved by that appellate division and specifying the extent to which the students may engage in activities otherwise prohibited by this statute.

* * * * * *

§ 485. VIOLATION OF CERTAIN PRECEDING SECTIONS A MISDEMEANOR

Any person violating the provisions of sections four hundred seventy-eight, four hundred seventy-nine, four hundred eighty, four hundred eighty-one, four hundred eighty-two, four hundred eighty-three or four hundred eighty-four, shall be guilty of a misdemeanor.

* * * * * *

§ 750. POWER OF COURTS TO PUNISH FOR CRIMINAL CONTEMPTS

* * * * * *

B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court

has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state.

Penal Law.

McKinney's Consolidated Laws of New York Annotated
Book 39

§ 10.00 Definitions of terms of general use in this chapter

Except where different meanings are expressly specified in subsequent provisions of this chapter, the following terms have the following meanings:

* * * * * *

6. "Crime" means a misdemeanor or a felony.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1290

CHARLES A. A'HEARN,

Petitioner,

—v.—

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS ASSOCIATION,

Respondent.

BRIEF OF NEW YORK COUNTY LAWYERS' ASSOCIATION, RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No.

CHARLES A. A'HEARN,

Petitioner,

—v.—

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS ASSOCIATION,

Respondent.

BRIEF OF NEW YORK COUNTY LAWYERS' ASSOCIATION, RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

This brief is submitted on behalf of the New York County Lawyers' Association, the respondent above named.

Statement of Questions Presented

1. Does § 90, subdivision 2 of the Judiciary Law of the State of New York confer jurisdiction over non-lawyers practicing, or assuming to practice law upon the Appellate Divisions of the Supreme Court of the State of New York?

2. Do the Appellate Divisions of the Supreme Court have the right to order, conduct or sanction an investigation of non-lawyers practicing or assuming to practice law under the authority conferred by § 90, subdivision 2 of the Judiciary Law?

3. Can the Appellate Divisions of the Supreme Court issue subpoenas to compel the attendance of witnesses and

the production of records and documents in aid of an investigation concerning non-lawyers who practice or assume to practice law?

4. Can the Appellate Divisions of the Supreme Court order, conduct or sanction an investigation of non-lawyers practicing or assuming to practice law through the agency of a bar association incorporated under the laws of the State of New York, acting by a duly constituted committee of such bar association?

5. Does Rule XII-A require respondent to establish probable cause by a factual statement under oath as a prerequisite to the issuance of a subpoena?

6. Does the issuance of this subpoena under Rule XII-A deprive appellant of life, liberty or property without due process of law?

7. Does the subpoena as issued constitute an unreasonable search and seizure?

8. Does the subpoena as issued constitute any other violation of the Fourth, Fifth, Sixth or Fourteenth Amendments to the United States Constitution?

The courts below answered questions 1, 2, 3 and 4 in the affirmative and 5, 6, 7 and eight in the negative.

Statement of the Case and Argument

Petitioner has been engaged in the business of pension and profit-sharing planning for some 25 years and maintains offices at 230 Park Avenue, New York, N. Y. (A 9).*

* References are to pages in appellant's appendix unless otherwise noted.

He is not a member of the bar of New York or any other state (A 9).

On November 21, 1966 respondent's Committee on Unlawful Practice of the Law (hereinafter referred to as "the Committee") advised petitioner, by letter, that it had learned that he was "offering [his] services to the public in the designing and drafting of pension, profit-sharing, and employee benefit programs." (A 23), and that a subcommittee had been appointed to investigate the matter, confer with petitioner and report to the Committee thereon (A 23). Petitioner was advised that he had the right to be represented by counsel at all stages of the proceeding (A 24).

On December 21, 1966 in response to petitioner's request for additional information (A 25) the Committee stated that the business engaged in by petitioner, by definition, entailed the performance of legal services (A 27) and that its investigation was designed to elicit the actual and pertinent facts relating to the services performed by petitioner and, for this purpose sought his voluntary cooperation (A 27-28).

On December 27, 1966, petitioner stated that he would not voluntarily cooperate with the committee (A 29).

Thereafter, and in June 1967, the chairman of the Committee applied to the Clerk of the court, pursuant to Rule XII-A of Part 4 of the Rules of the Appellate Division, First Department, for the issuance of a subpoena addressed to petitioner (A 30-31).

The subpoena duces tecum which accompanied the application was duly issued by the Clerk in the name of the

Presiding Justice on September 21, 1967 (A 13-14) and thereafter it was served upon petitioner (A 9).*

Petitioner then moved to quash said subpoena and said motion was denied by an order of Special Term, Part I of the Supreme Court entered January 8, 1968.

Petitioner appealed the order of Special Term to the Appellate Division, First Department and the appeal was transferred by said court to the Appellate Division, Third Department, pursuant to § 5711 CPLR.

The Appellate Division, Third Department affirmed the order of Special Term on May 10, 1968, one Justice dissenting.

Petitioner appealed to the Court of Appeals which affirmed unanimously (6-0) (23 N.Y. 2d 916).

Applicable Statutes and Rules

Section 90, Subdivision 2, Judiciary Law (App. C, p. 58):

> "2. The supreme court shall have power and control over attorneys and counsellors-at-law and *all persons practicing or assuming to practice law . . .*" (Emphasis added)

Section 476-a. Judiciary Law:

> "476-a. ACTION FOR UNLAWFUL PRACTICE OF THE LAW
>
> 1. The attorney-general may maintain an action upon his own information or upon the complaint of

---

* Petitioner's statement of the period of time covered by the subpoena is erroneous. The original subpoena (A 13, 21) was limited to the period January 1, 1966 to May 31, 1967. There was no modification.

a private person or of a bar association organized and existing under the laws of this state against any person, partnership, corporation, or association, and any employee, agent, director, or officer thereof who commits any act or engages in any conduct prohibited by law as constituting the unlawful practice of the law. . . ."

Section 476-b. Judiciary Law:

"476-b. INJUNCTION TO RESTRAIN DEFENDANT FROM UNLAWFUL PRACTICE OF THE LAW

In an action brought as prescribed in section four hundred seventy-six-a, the final judgment in favor of the plaintiff shall perpetually restrain the defendant from the commission or continuance of the act complained of . . ."

Section 750-B, Judiciary Law:

"B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state."

Section 2-b, Judiciary Law:

"2-b. General powers of courts of record

A court of record has power

1. to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pend-

ing in that court, subject, however, to the limitations prescribed by law with respect to the portion of the state in which the process of the local court of record may be served;

2. to administer an oath to a witness in the exercise of the powers and duties of the court and;

3. to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it."

Section 216, Judiciary Law:

"216. Additional powers and duties of the appellate divisions

In addition to the powers and duties eleswhere enumerated in this chapter, each appellate division, with respect to the courts in its department, shall have power to:

1. Adopt, promulgate, supplement, rescind and modify rules and orders necessary to supplement its powers and duties hereunder including the supervision of the administration and operation of the courts in its department, not inconsistent with any statute hereafter adopted and the standards, policies, rules and orders of the administrative board.

Rule XII-A, Part 4:

"Rule XII-A. Preliminary Investigation of Persons, Firms or Corporations Unlawfully Practicing or Assuming to Practice Law.

Upon application by the Chairman or Acting Chairman of the Committee on Unlawful Practice of the Law of the New York County Lawyers' Association, the Association of the Bar of the City of New York, or the Bronx County Bar Association, disclosing that such Committee has reason to be-

lieve that a person, firm or corporation is unlawfully practicing or assuming to practice law, and that such Committee desires that an investigation thereof be conducted, or upon application by any such person, firm or corporation under such investigation, the clerk of this court shall issue subpoenas in the name of the Presiding Justice for the attendance of witnesses and production of books and papers before such Committee, or any subcommittee of such Committee designated in such application at the time and place within the First Judicial Department that said Committee or subcommittee regularly meets."

CPLR § 2302. Authority to issue

"(a) Without court order. Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required."

I

The Appellate Divisions of the Supreme Court of the State of New York have power, control and jurisdiction over non-lawyers who practice or assume to practice law.

The petition herein and the arguments advanced for its allowance are based upon the erroneous assertion that the abatement of an unlawful practice of law, in the State of New York, is exclusively a criminal prosecution and a

crime, punishable as a misdemeanor. On the contrary, an action to abate an unauthorized practice of law is regarded primarily as a civil proceeding, commonly resulting in an injunction restraining the unlawful practice.

See:

In re: *Roel,* 3 N.Y. 2nd 224 (1967), appeal dismissed 255 U.S. 604 (1958);
New York County Lawyers Assn. v. *Bercu,* 273 App. Div. 524 affirmed 299 N.Y. 728 (1948).

The New York practice and policy regarding the prosecution of unlawful practice matters was succinctly stated by the Appellate Division First Department in the *Bercu* case, *supra,* as follows:

> "To practice law *in any manner,* unless one be duly and regularly licensed and admitted to practice law, is a violation of Section 270 of the Penal Law and it has been determined that giving legal advice outside of Court is a violation of that statute. (Citing case) Three procedural routes are available for enforcing the statute. One is by criminal prosecution, another is by action for an injunction under Article 75A of the Civil Practice Act, and a third is by summary proceeding under Sections 90, subd. 2, and 750, subd. 7 of the Judiciary Law." (273 App. Div. at p. 527).

Criminal prosecutions are, in fact, the rarity rather than the rule.

Article 4, § 90 subd. 2 of the Judiciary Law, since 1937, has conferred upon the supreme court "power and control of . . . all persons practicing or assuming to practice law."

Petitioner's primary attack is on the authority of the Appellate Division, First Department, to order, conduct,

or sanction an investigation of non-lawyers assuming to practice law. What he seeks in effect, is immunity.

See: *Oklahoma Press Publishing Co.* v. *Walling,* 327 U.S. 186, 196.

The courts of New York have historically and traditionally exercised jurisdiction over, and have conducted investigations of, laymen whose activties impinge upon the practice of law, and when necessary, have issued subpoenas to compel the production of books and records.

> *Anonymous Nos. 6 and 7* v. *Baker,* 360 U.S. 287 (1959);
> *Matter of the Association of the Bar of the City of New York,* 222 App. Div. 580 (1st Dept. 1928);
> *Matter of S. Anonymous* v. *Arkwright,* 5 App. Div. 2nd 792 (2nd Dept. 1938).

In *Anonymous Nos. 6 and 7 v. Baker,* 360 U.S. 287 (1959), the appellants were private detectives and investigators summoned to testify before a justice of the Supreme Court appointed by the Appellate Division, Second Department to conduct a non-adversary, non prosecutorial fact-finding inquiry into alleged unethical practices of attorneys and others acting in concert with them. They refused to testify and were held in contempt. In affirming the contempt convistions this Court observed:

> "When the Appellate Division is apprised of conditions calling for general inquiry it usually appoints, as here, a Justice of the Supreme Court, sitting at Special Term, to make a preliminary investigation. The duties of such a justice are purely investigatory

> and advisory, culminating in one or more reports to the Appellate Division upon which future action may then be based. In the words of Mr. Justice Cardozo, then Chief Judge of the New York Court of Appeals, the proceedings at Special Term thus simply constitute a 'preliminary inquisition, without adversary parties, neither ending in any decree nor establishing any right . . . a quasi-administrative remedy whereby the court is given information that may move it to other acts thereafter . . .' *People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 479, (360 U.S. 287, at p. 291).

Essentially the same procedure was followed and the identical result was reached in *Matter of the Association of the Bar of the City of New York,* 222 App. Div. 580 (1st Dept. 1928), and *Matter of S. Anonymous* v. *Arkwright,* 5 App. Div. 2nd 792 (2nd Dept. 1958), both involving laymen.

In *Matter of the Association of the Bar of the City of New York, et al., supra,* the respondent herein and two other bar associations petitioned the Appellate Division to investigate a practice commonly known as "ambulance chasing". The court ordered a Justice of the Supreme Court to investigate "with full power to summon witnesses and to compel the giving of testimony, as well as the production of books, papers and other documentary evidence", and further ordered that the investigation extend not only to "ambulance chasing" and the conduct of attorneys, but also to the conduct of *such laymen* as might be acting in concert with the attorneys or as intermediaries for them.

Thereafter, in *Matter of S. Anonymous* v. *Arkwright, supra,* the Appellate Division of the Second Department had occasion to consider a subpoena *duces tecum* which had been issued to a physician in connection with an investiga-

tion into the practices of certain attorneys and "others acting in concert with them". He attended, was sworn, and refused to answer questions, asserting that the order of the Appellate Division was invalid in that he was not an attorney and, accordingly not subject to the court's jurisdiction. He also asserted his privileges under the New York State and United States Constiution and his right to be represented by counsel during the inquiry. The Appellate Division, Second Department held:

> "It was within the power and jurisdiction of this court to make the order directing the inquiry and investigation (N.Y. Const., art. VI § 2; Judiciary Law, § § 86, 90; Matter of Bar Assn. of City of N. Y. 222 App. Div. 580; Matter of Brooklyn Bar Assn., 223 App. Div. 149; People ex rel. *Karlin* v. *Culkin*, 248 N.Y. 465), and petitioner was required to answer questions as to his actions in concert with an attorney subject to his right to refuse to answer such questions if his answer would expose him to punishment for crime or if his refusals were based on other valid grounds. In its discretion the additional Special Term might have permited petitioner's attorney to be present while petitioner was being questiond, since it is clear that he was merely a witness as to improper conduct of others but was himself to be questioned as to his own allegedly improper and unlawful acts in concert with an attorney, the petitioner in Matter of M. Anonymous. (5 A D 2d 790)." (5 App. Div., 2d at pp. 792-793)

Any possibility of doubt that the legislature intended the power and authority of the Appellate Division, under § 90, subd. 2 of the judiciary law (Appl. C p. 58), to extend to laymen was removed by the 1937 amendments to that section and § 750B of the Judiciary Law, (App. C. p. 68) which

added the phrase "all persons practicing or assuming to practice law" to the former and made such conduct punishable as a contempt of court by the latter.

In the instant case, the appellant, Charles A. A'Hearn, is, by his own admission engaged in a practice which falls within the classification of one who is "assuming to practice law." He states that he is, and for 25 years has been, "engaged in the business of pension and profit-sharing planning". (A 9), and he advertises and holds himself out to the public as available to perform services and accept employment in this field. (A 23)

Pension and profit sharing planning, by definition, includes the practice of law. A pension or a profit sharing plan is a legal document. In conjunction with such plans, there are necessarily involved the preparation of trust agreements, corporate minutes and resolutions, consideration and advice regarding applicable provisions of statutory law, particularly the Internal Revenue Code, appearances and arguments before the Internal Revenue Service and changes and amendments to the various agreements and documents relative to the adoption, promulgation and implementation of such plans. (A 20, A 27-28)

The business which the petitioner engages in materially, directly, and inevitably, affects the practice of law, and by engaging therein, the petitioner has brought himself under the jurisdiction of the Appellate Division, First Department.

II

Respondent's committee is a quasi-judicial body acting as an arm of the Appellate Division under Rule XII-A; the investigation of an unlawful practice of the law is a judicial proceeding.

It has been shown that the power to issue subpoenas in aid of investigations into the practices of laymen which affect the practice of the law is within the powers and authority of the Appellate Divisions of the Supreme Court in the several departments of the State of New York.

In addition thereto, it is clear that the Appellate Divisions may enlist the aid of attorneys, associations of attorneys and committees of such associations in investigating conduct which impairs, impedes, or infringes upon the practice of the law.

> *Weiner* v. *Weintraub,* 22 N.Y. 2d 331 (1968);
> *Dacey* v. *New York County Lawyers Association,* 290 F. Supp. 835 (S.D.N.Y. 1968);
> § 90 Judiciary Law.

The analogy between the investigation of those who have been licensed and those who, although not licensed, nevertheless assume to practice law is inescapable.

The Court of Appeals of the State of New York has recently held that a proceeding before the Grievance Committee of a bar association investigating professional misconduct is a "judicial proceeding" and the committee conducting the proceeding "acts as a quasi-judicial body and, as such, is an arm of the Appellate Division."

Weiner v. *Weintraub, supra.*

An unlawful practice committee of such a bar associaiton investigating the conduct of a person who unlawfully assumes to practice law is equally a quasi-judicial body conducting a judicial proceeding and, as such, is acting as an arm of the Appellate Division.

The United States District Court for the Southern District of New York recently considered the position occupied by the respondent in the institution of proceedings in connection with the unauthorized practice of the law in *Dacey* v. *New York County Lawyers Association, supra.*

In the *Dacey* case, an action was brought against respondent under § 1983 of Title 42, U.S.C., to recover damages and for an injunction following the dismissal of proceeding brought by respondent against *Dacey.* Granting a motion by respondent to dismiss Dacey's complaint, the court (Wyatt, D.J.), relying, in part, upon the holdings in the State Courts in the instant case, stated:

> "It thus appears that the Association when it acts under Judicial Law § 750 B is a part of the judicial proeess of New York. The situation at bar seems exactly the same as that of a bar association sued for damages for its activities under Court Rule which led to the disbarment of a lawyer. This happened in the State of Washington. The lawyer then sued the bar association under the civil rights laws, 42 U.S.C. § 1983. The association was held to have absolutely immunity (*Clark* v. *State of Washington,* 366 F. 2d 678 (9th Cir. 1966)), the Court saying (at 681):
>
> > 'As an arm of the Washington Supreme Court in connection with disciplinary proceedings, the Bar Association is an "integral part of the judicial process" and is therefore entiled to the same im-

munity which is afforded to prosecuting attorneys in that state.'

I am unable to distinguish the situation in *Clark* from that at bar.'' (290 F. Supp. at p. 841-2)

It is respectfully submitted that the situation herein is truly indistinguishable from that which pertained in *Clark* v. *State of Washington*, 386 F. 2d, 678 (9th Cir. (1966)); *Wiener* v. *Weintraub*, 22 N.Y. 2d 331 (1968); and *Dacey* v. *New York County Lawyers' Assn.*

The Appellate Division of the First Department has the power to order and sanction the investigation of persons assuming to practice law within its department, to enlist the aid of bar associations in furtherance thereof and adopt Rule XII-A in aid therof. Such an investigation constitutes a judicial proceeding and respondent's committee is, in conducting the same, a quasi-judicial body acting as an arm of the court.

III

No constitutional rights, privileges or immunities of the appellant have been infringed.

Probable cause need not be shown as a prerequisite for the issuance of a *subpoena duces tecum.*

U.S. v. *Powell*, 279 U.S. 48 (1964);
Ryan v. *U.S.*, 379 U.S. 61 (1964).

The subpoena herein (A 13), on its face, complies with every requirement which has been invoked by the courts.

The subject matter of the inquiry is set forth on the face of the subpoena, the records and documents are specifically

described and the scope of the subpoena is limited to transactions occurring within a period of 17 months (A 13). The relevancy of the documents directed to be produced is patent. Each and every one of them relates specifically and directly to the services performed by the appellant in connection with the operation of the business of pension and profit-sharnig planning in which appellant was concededly engaged. (A 9, A 13).

The distinction between what is required in connection with the issuance of the subpoena and what is required in connection with the issuance of a search warrant has been enunciated time and time again.

As the courts below properly held, a subpoena need only be supported by a showing that the material sought is reasonably related to the matter being investigated, the public purpose sought to be achieved, and that the investigation is authorized by law.

Matter of LaBelle Creole Int. S.A. v. *Attorney-General of State of N.Y.*, 10 N.Y. 2d 192
Matter of Ryan v. *Lefkowitz*, 26 A.D. 2d 604, affd. 18 N.Y. 2d 977 (1966);
Matter of Dawn Operators v. *Lyon*, 283 App. Div. 358, mot. for lv. to app. den. 360 N.Y. 977, app. dsmd. 307 N.Y. 673 (1954);
Matter of Prestige Sewing Stores of Queens v. *Lefkowitz*, 54 Misc. 2d 188;
Oklahoma Press Pub. Co. v. *Walling*, 327 U.S. 186 (1945);
See also *United States* v. *Powell*, 279 U.S. 48 (1964);
United States v. *Morton Salt Co.*, 338 U.S. 632 (1949);
Ryan v. *United States*, 379 U.S. 61 (1964).

No one has entered petitioner's premises, nothing has been seized, no one has been searched.

No testimony or records which the petitioner believes might be used in evidence against him can be compelled to be given or produced since, obviously, all he need do is assert his privilege under the Fifth Amendment to the United States Constitution, or Article 1, Section 6 of the Constitution of the State of New York.

No penalty or forfeiture will be visited upon petitioner should he appear and refuse to answer any question or produce any record upon the ground that it might incriminate him.

Should petitioner so appear, and plead the Fifth Amendment as a bar to his testimony or the production of his records, respondent will then have to determine whether it should seek to have immunity from criminal prosecution conferred upon the petitioner so that his answers and records may thereupon and thereafter be elicited. Certainly, it requires no argument to establish that the bar of the Fifth Amendment does not preclude the obtaining of evidence for use in connection with the enforcement of the civil remedy of injunction. Obviously this is precisely what petitioner seeks to avoid.

It is difficult, if not impossible to follow the arguments advanced by petitioner with respect to the application of the Sixth and Fourteenth Amendments to the instant situation. As appellant has asserted repeatedly, no civil or criminal prosecution has been instituted against him (A 10).

In this situation, it is rather difficult to understand how the appellant can have already been deprived of the oppor-

tunity to be confronted with the witnesses against him, to have a public trial or how it is possible for him to ascertain that upon such a trial he will be prosecuted in an unfair and prejudicial manner, deprived of life, liberty or property without due process, and will not receive the equal protection of the law.

CONCLUSION

Under the provisions of § 90, subd. 2, of the Judiciary Law, non-lawyers assuming to practice law are within the power and control of the appellate divisions of the Supreme Court of the State of New York which have the authority to conduct and sanction investigations into such conduct. Rule XII-A of the Special Rules of the Appellate Division, First Department was properly adopted by it in aid of such investigations, and a committee of a bar association acting thereunder is a quasi-judicial body acting as an arm of the court in a judicial proceeding. The subpœna *duces tecum* issued by the Clerk of the Appellate Division, First Department herein is a valid exercise of the court's power, reasonable in scope and is directed to testimony, books, records, documents which are material and relevant to the inquiry.

None of petitioner's right, privileges or immunities under the Fourth, Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States have been violated.

The petition for certiorari should be denied.

Respectfully submitted,

DANIEL M. SHIENTAG
Counsel for Respondent

SUPREME COURT, U. S.

FILED
JUN 9 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1290

CHARLES A. A'HEARN,

Petitioner,

v.

COMMITTEE ON UNLAWFUL PRACTICE OF THE LAW OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION,

Respondent.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I

Respondent's contention that "all" petitioner "need do is assert (on the witness stand) his privilege under the Fifth Amendment" (Brief, p. 17) is particularly monstrous, coming as it does from a bar association organized for the purpose of "facilitating the administration of justice"* and pretending to act as an "arm" of a court—a pretension unsupported by evidence of so acting, or by

* New York Membership Corporations Law, Sec. 11 (7); McKinney's Consolidated Laws of New York Annotated, Book 34, Sec. 11 (7).

statutory authorization. Respondent's contention ignores completely the Fourth and Sixth Amendments, the due process clause of the Fifth and Fourteenth Amendments, and the stigma attached to "taking the Fifth". No target of an investigation of crime may be placed on the witness stand and subjected to questioning under oath unless he has been brought to the witness stand in compliance with constitutional requirements of reasonableness and probable cause, the due process requirement of the Fifth and Fourteenth Amendments, and the Sixth Amendment guarantee of the right to be informed of the nature and cause of the accusation.

There is no difference in principle between an inquisition of a person suspect of a crime by the arresting officer before a desk sergeant-referee, than an inquisition of such a person by the attorney for a bar association before a sergeant-at-arms committee member referee. The latter procedure is indeed more repugnant to our system of justice than the former. In the latter situation, the questioning is under oath and the inquisitor and the referee member of the inquisitor's employer are both lawyers skilled in the "subtler devices" of making a suspect "the unwilling collaborator in establishing his own guilt" (*Culombe* v. *Connecticut,* 367 U. S. 568, 574-575 (1961). The "blood of the accused is not the only hallmark of an unconstitutional inquisition" (*Blackburn* v. *Alabama,* 361 U. S. 199, 206 (1960)).

II

In re Murchison, 349 U. S. 133 (1955), this Court stated, page 137:

> "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. * * * Having been part of that process a judge cannot be, in the very nature of things, wholly

> disinterested in the conviction or acquittal of the accused."

See also *Tumey* v. *Ohio,* 273 U. S. 510, 534 (1927).

In clear repudiation of this rule of elemental fairness, the majority of the Appellate Division, Third Department, here held (A50):

> "* * * it would be unreasonable indeed to deny to the court inquisitorial powers at least equal to those possessed by a Grand Jury * * *."

That a court may not be both investigator and judge was indeed, recognized instinctively by the learned Appellate Division, First Department, promulgator of Rule XII-A, when, on its own motion, and "in furtherance of justice" (N. Y., CPLR 5711), it declined to hear petitioner's appeal from the order denying his motion to quash the subpoena *duces tecum* and transferred the appeal to the Appellate Division, Third Department (A39-A40). With all due respect to the Appellate Division, the denial of due process inherent in a court conducted or sponsored criminal investigation procedure is not remedied by a transfer of the judging part of the procedure to another geographical department of the investigating court. The Court, by this procedure, renounces its jurisdiction and becomes a partisan and petitioner's adversary as is evident from respondent's pretension to be an arm of the court. Petitioner's recourse to this Court for his constitutional rights is, therefore, particularly necessary in these circumstances. That this is so further appears from the decision of the New York Court of Appeals upholding issuance of the subpoena to petitioner, notwithstanding its issuance without even a "slender" showing of cause, and the Court's determination that Rule XII-A "Significantly" requires a showing of cause as a "condition precedent" to issuance of such a subpoena (App. A to Petition, pp. 27-28).

III

The day the instant petition for certiorari was filed, this Court granted certiorari in *Morales* v. *New York* (22 N Y 2d 55), involving the issue of "investigative seizure" left undecided in *Terry* v. *Ohio,* 392 U. S. 1 (1968). The issue in *Morales,* as stated page 10 of the petition for certiorari in that case, is:

> "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention and/or investigation.' "

The same issue of personal security is presented here. In *Morales* the seizure was by force of the police for the purpose of an investigation of crime. Here the seizure, and search too, are by force of a subpoena *duces tecum* for the same purpose. The result is the same. The personal security of a citizen has been intruded upon without probable cause. In both cases a citizen has been subjected to the harassment and ignominy incident to involuntary investigatory detention. In both cases, the object of the detention is to establish out of the mouth of the citizen that he is guilty of a crime. In both cases, the "central inquiry under the Fourth Amendment" is the same; "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra,* 392 U. S. 1, 19; see also, *Davis* v. *Mississippi,* —— U. S. —— (April 22, 1969).

The subpoena *duces tecum* here was obtained from a clerk of court on the bare statement of respondent that it had "cause to believe" that petitioner "is unlawfully practicing law" (A30-A31). No facts were alleged in support of such statement. Nor were any supporting facts alleged by respondent in opposition to the motion to quash. When a bar association committee undertakes to make a person a target of an investigation of conduct that is criminal it is not a neutral; it has an "axe to grind." Its bare state-

ment of "cause to believe" is not an unbiased conclusion of an infallible authority. As this Court recently held in *Sibron* v. *New York,* 392 U. S. 40, 59 (1969):

> "* * * No search required to be made under a warrant is valid if the procedure for the issuance of the warrant is inadequate to ensure the sort of neutral contemplation by a magistrate of the grounds for the search and its proposed scope, which lies at the heart of the Fourth Amendment."

A private membership bar association is not an agent of the public and has no right to intrude upon the personal security of any citizen. But if it is such an agent, and has such authority, the Fourth Amendment governs its intrusion here, as it does "all intrusions by agents of the public upon personal security" (*Terry* v. *Ohio, supra,* 392 U. S. 1, 18; see also *infra,* pp. 6-7).

IV

In *Matter of Murray* v. *Murphy,* 24 N Y 2d 150 (1969), the New York Court of Appeals, only two months after its decision in the instant case, said, page 157:

> "The first fundamental of due process is notice of the charges made. This principle equally applies to an administrative proceeding for even in that forum no person may lose fundamental rights because of wrongdoing shown by evidence, but not charged. (*Matter of Ruffalo,* 390 U. S. 544; *Matter of Shapiro* v. *Board of Regents,* 16 N Y 2d 783; *Matter of Hecht* v. *Monaghan,* 307 N. Y. 461, 473-474; *Cole* v. *Arkansas,* 333 U. S. 196; *Lloyd Sabaudo Societa* v. *Elting,* 287 U. S. 329, 339-340)."

This principle, settled by this Court's decision in the *Ruffalo* case, which petitioner unsuccessfully relied upon below, was not followed in the instant case. Petitioner is

being investigated for a crime without charges. If, upon evidence he produces in response to the subpoena *duces tecum,* his investigator then charges wrongdoing, he too will have lost "substantial rights because of wrongdoing shown by evidence, but not charged." A subpoena *duces tecum* process is not due process when utilized to command the production of evidence that places the person subpoenaed in jeopardy of losing "substantial rights." As the New York Court of Appeals further said in *Matter of Murray,* 24 N Y 2d 157:

> "* * * Where we are involved with such a fundamental right as the right to be put on notice of the charges made, prejudice will be presumed."

The same Court was involved with the same fundamental right in the instant case and came to a completely opposite conclusion contrary to its own earlier decisions and contrary to decisions of this Court. The explanation for this disparity of treatment of a fundamental right may not be grounded on a proposition that the "first fundamental of due process" is inapplicable to an investigation of crime by a court with the aid of a bar association.

The denial to petitioner by the Court below of that "fairness" which the Court below in *Matter of Murray* recognized to be "elemental" (24 N Y 2d 157), is so plain as to merit review and correction by this Court.

V

Respondent's reliance upon grievance committee cases involving professional misconduct of lawyers is misplaced. Unauthorized practice of law is a crime, not a matter for disciplinary action by the Appellate Division whch has exclusive original jurisdiction over lawyer disciplinary proceedings under Section 90 of the New York Judiciary Law (*Matter of Erlanger,* 20 N Y 2d 778, 779 (1967); *Waldo* v. *Schmidt,* 200 N. Y. 199 (1910).

Matter of Association of the Bar of the City of New York, 222 App. Div. 580 (1st Dept., 1928), which respondent says involved essentially the "same procedure" with an "identical result" (Brief, p. 10), like other cases relied upon by respondent, involved an "ambulance chasing" investigation. The unreliability of such decision is further evident from the fact that it was an advisory non-adversary opinion whereby the petitioners, without notice to any adversary, "fortified themselves in advance by judicial instruction;" an opinion contrary to the "function of courts" to "determine controversies between litigants" (*Matter of State Industrial Comm.*, 224 N. Y. 13, 16 (1918).

Respondent has not cited any case involving or upholding an investigation by the Appellate Division or by any other court of unauthorized practice of law. Respondent is in error in saying "that the situation herein is truly indistinguishable from that which pertained in *Clark* v. *State of Washington,* 386 F. 2d 678 (9th Cir. 1966)" (Brief, p. 15). *Clark* was also a disciplinary proceeding case. Moreover, the State of Washington, unlike New York, has an integrated "State Bar" created by statute as "an agency of the state" with statutory power over unlawful practice of law (Revised Code of Washington, Annotated, Title 2, Secs. 2.48.010-2.48.180). Respondent is not an agency of the State of New York for any purpose; it is nowhere charged with enforcement of the prohibitions of unlawful practice of law; its contention that it is an arm of the Appellate Division is without basis in law or precedent in fact. A constitutional court has only such arms as are provided for by constitution and statute.

Respectfully submitted,

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June, 1969.